87-158

CASE NO._____

Supreme Court, U.S.
FILED
JUL 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

October, 1987 Term

STATE OF OHIO,

Appellee

vs.

ROBERT N. BEREZOSKI,

Appellant

On Appeal from the Court of Appeals
Montgomery County, Ohio

ERIC H. BRAND
100 Washington Avenue
Greenville, Ohio 45331
(513) 548-2211

ATTORNEY FOR APPELLANT

STATEMENT OF QUESTIONS ON APPEAL

PROPOSITION OF LAW NO. 1

THE MANNER IN WHICH PROSECUTION WAS COMMENCED IN THIS CASE VIOLATED THE APPELLANT'S RIGHTS UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY FAILING TO INFORM THE DEFENDANT OF THE NATURE AND CAUSE OF THE CRIME ALLEGED.

PROPOSITION OF LAW NO. 2

THE ADMISSION OF TESTIMONY IN VIOLATION OF THE RULE PRECLUDING INTERSPOUSAL COMMUNICATIONS TESTIMONY VIOLATED THE FIFTH AMENDMENT RIGHT AGAINST SELF INCRIMINATION AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

PROPOSITION OF LAW NO. 3

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ADMITTING EDITED TAPE RECORDINGS OF TELEPHONE CONVERSATIONS BETWEEN APPELLANT AND HIS EX-WIFE IN VIOLATION OF THE APPELLANT'S RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

STATEMENT OF PARTIES

Counsel for the Appellant certifies that the caption to this appeal contains the names of all parties herein.

TABLE OF CONTENTS

PAGE(S)

STATEMENT OF QUESTIONS ON APPEAL

STATEMENT OF PARTIES

TABLE OF CONTENTS i

TABLE OF AUTHORITIES. v

STATEMENT OF REFERENCE TO OPINIONS 1

STATEMENT OF GROUNDS FOR JURISDICTION 2

STATEMENT OF CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF EVIDENCE. 3

STATEMENT OF THE CASE 4

STATEMENT OF FACTS. 8

THE ARGUMENT FOR PLENARY CONSIDERATION

PROPOSITION OF LAW NO. 1

THE MANNER IN WHICH PROSECUTION WAS COMMENCED IN THIS CASE VIOLATED THE APPELLANT'S RIGHTS UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY FAILING TO INFORM THE DEFENDANT OF THE NATURE AND CAUSE OF THE CRIME ALLEGED. 11

Authorities Cited (in the order in which they appear in the brief)

United States v. Marion (1971), 404 U.S. 307, 324 12

TABLE OF CONTENTS (continued)

PAGE(S)

Sixth Amendment, United States Constitution 13, 15

State v. Sellards (1985), 17 Ohio St.3d 169, 172 14

PROPOSITION OF LAW NO. 2

THE ADMISSION OF TESTIMONY IN VIOLATION OF THE RULE PRECLUDING INTERSPOUSAL COMMUNICATIONS TESTIMONY VIOLATED THE FIFTH AMENDMENT RIGHT AGAINST SELF INCRIMINATION AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION . . 16

Authorities Cited (in the order in which they appear in the brief)

Ohio Evidence Rule 601(B). . . 16

State v. Rahman (1986), 23 Ohio St.3d 146. 16

Ohio Revised Code §2945.42 . . 17, 18

Ohio Revised Code §2901.04 . . 17

Fourteenth Amendment, United States Constitution 18

Fifth Amendment, United States Constitution 18

Chapman v. California (1967), 386 U.S. 18 18

PROPOSITION OF LAW NO. 3

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ADMITTING

TABLE OF CONTENTS (continued)

PAGE(S)

EDITED TAPE RECORDINGS OF TELEPHONE CONVERSATIONS BETWEEN APPELLANT AND HIS EX-WIFE IN VIOLATION OF THE APPELLANT'S RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION. 20

Authorities Cited (in the order in which they appear in the brief)

Ohio Evidence Rule 404(B). . . 21

State v. Curry, (1975) 43 Ohio St.2d 66. 21

State v. Thompson, (1981) 66 Ohio St.2d 496. 21

Fifth Amendment, United States Constitution 22

Ohio Evidence Rule 403(A). . . 22

Sixth Amendment, United States Constitution 23

CONCLUSION. 24

PROOF OF SERVICE. 28

APPENDIX

Entry of Counsel Appearance. . 29

Notice of Appeal to the United States Supreme Court. 31

Entry of Dismissal of Appeal by the Ohio Supreme Court. . . . 33

TABLE OF CONTENTS (continued)

	PAGE(S)
Notice of Appeal to the Ohio Supreme Court	35
Assignments of Error Filed in the Court of Appeals.	37
Montgomery County Court of Appeals Opinion	41
Montgomery County Court of Appeals Final Entry	174
Fifth Amendment, United States Constitution.	176
Sixth Amendment, United States Constitution.	176
Fourteenth Amendment, United States Constitution	177
Ohio Revised Code §2901.04 . .	181
Ohio Revised Code §2907.02 . .	181
Ohio Revised Code §2907.05 . .	185
Ohio Revised Code §2945.42 . .	189
Ohio Rule of Evidence 403. . .	192
Ohio Rule of Evidence 404. . .	192
Ohio Rule of Evidence 601. . .	194

TABLE OF AUTHORITIES

CASES	PAGE(S)
Chapman v. California (1967), 386 U.S. 18.	18
State v. Curry (1975), 43 Ohio St.2d 496.	21
State v. Rahman (1986), 23 Ohio St.3d 146.	16
State v. Sellards (1985), 17 Ohio St.3d 169, 172.	14
State v. Thompson (1981), 66 Ohio St.2d 496	21
United States v. Marion (1971) 404 U.S. 307, 324.	12

STATUTES	PAGE(S)
Ohio Revised Code §2901.04. . . .	17
Ohio Revised Code §2907.02. . . .	4
Ohio Revised Code §2907.05. . . .	4
Ohio Revised Code §2945.42. . . .	17, 18

OTHER AUTHORITIES	PAGE(S)
Fifth Amendment, United States Constitution	18, 22
Fourteenth Amendment, United States Constitution.	18
Sixth Amendment, United States Constitution	13, 15, 23
Ohio Rule of Evidence 403	22

TABLE OF AUTHORITIES (continued)

	PAGE(S)
Ohio Rule of Evidence 404	21
Ohio Rule of Evidence 601	16

STATEMENT OF REFERENCE TO OPINIONS

Opinions and decisions issued by the appellate courts below, are reproduced in their entirety in the appendix hereto.

STATEMENT OF GROUNDS FOR JURISDICTION

The within appeal of criminal conviction entered in the Montgomery County, Ohio, Court of Common Pleas is based upon an Entry of Judgment dated April 8, 1987 filed by the Ohio Supreme Court dismissing, without hearing, a decision entered December 30, 1986 by the Ohio Court of Appeals, Second District, affirming Appellant's convictions on seven separate counts of gross sexual imposition in violation of §2907.05 of the Ohio Revised Code.

This appeal is brought pursuant to 28 U.S.C. §1257(2).

STATEMENT OF CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF EVIDENCE

(As these items are voluminous, they are set forth in the appendix hereto.)

Fifth Amendment, United States Constitution

Sixth Amendment, United States Constitution

Fourteenth Amendment, United States Constitution

Ohio Revised Code §2901.04

Ohio Revised Code §2907.02

Ohio Revised Code §2907.05

Ohio Revised Code §2945.42

Ohio Rule of Evidence 403

Ohio Rule of Evidence 404

Ohio Rule of Evidence 601

STATEMENT OF THE CASE

On January 16, 1985, a 17 count indictment was filed in the Montgomery County Common Pleas Court, charging Appellant with 10 counts of rape in violation of §2907.02 O.R.C. and with 7 counts of gross sexual imposition in violation of §2907.05 O.R.C. Each count was alleged to have occurred against Appellant's step-daughter, "between the dates of June 1, 1982 and September 1, 1983."

On January 16, 1985, Appellant entered pleas of not guilty to all counts and posted bond.

On January 17, 1985, Counsel for Appellant filed motions for a bill of particulars, to quash the indictment, for discovery, and for a severence of counts. On January 25, 1985, Appellant's Counsel filed a motion to dismiss the indictment. (This first

raised Proposition No. 1 supra as issue.) These motions were subsequently overruled except that the motion for a bill of particulars was sustained.

On February 14, 1985, Counsel for Appellant filed a Motion in Limine to preclude the testimony of Appellant's ex-wife, (this put in issue Proposition No. 2 supra) and a motion requesting a psychological evaluation of the complainant. The first motion was subsequently overruled and the second was sustained.

On February 27, 1985, Appellee filed a bill of particulars.

On May 9, 1985, Appellant's Counsel filed another Motion in Limine requesting that the surreptitious tape recordings by Appellant's ex-wife be precluded from trial. On May 31, 1985, Counsel for Appellant filed an objection to the use of those same tapes. (This initiated the issue that is stated

in Proposition No. 3 supra.) Edited portions of the tapes were later admitted at trial.

Jury trial was commenced on August 25, 1985. At its conclusion, Appellant was found not guilty on ten counts of rape, and guilty on seven counts of gross sexual imposition.

On September 20, 1985, the Court imposed sentences of one year on each of the seven counts of gross sexual imposition, all sentences to run consecutively.

On that same day, Appellant filed his Notice of Appeal to the Montgomery County Court of Appeals.

Appellant's brief was filed on March 10, 1986. A supplement to that brief was filed on May 6, 1986. Appellee's brief was filed June 23, 1986. Appellant filed a reply brief on July 7, 1986.

On December 17, 1986, the Court of Appeals filed its decision affirming

Appellant's conviction. The Court's final entry was filed December 30, 1986.

On January 28, 1987, Appellant duly filed his Notice of Appeal to the Supreme Court of Ohio. On February 19, 1987, Appellant filed a Memorandum in Support of Jurisdiction.

On April 8, 1987, the Ohio Supreme Court dismissed the Appeal, without hearing or opinion.

Appellant has concurrent herewith, filed his Notice of Appeal.

STATEMENT OF FACTS

Dr. Robert N. Berezoski (hereinafter, Appellant) is a forty-one year old, board certified plastic surgeon and board certified otolaryngologist. He is one of fifty (50) doubly certified physicians in the United States.

Prior to his conviction, Appellant had engaged in the private practice of medicine in the Dayton, Ohio area. He also taught at the Wright State College of Medicine and was associated with a number of hospitals in the Dayton area.

Appellant has no prior criminal history.

He is currently married and has custody of three children of a previous marriage. His present wife's daughter also lives in the Berezoski household.

In 1978, Appellant married Diane Berezoski, the mother of the Complainant.

Diane Berezoski moved out of Appellant's house in 1983, and a bitter and hotly contested divorce proceeding ensued. The divorce was finalized in June, 1984.

Six months later, Appellant was indicted by the Montgomery County Grand Jury. Each count alleged that Appellant had committed an offense against Diane Berezoski's daughter of a previous marriage, "between the dates of June 1, 1982 and September 1, 1983."

At trial, Appellee was permitted to introduce surreptitiously made tape recordings of Appellant's phone conversations with his now ex-wife. Appellant was found not guilty of all rape counts but guilty of seven (7) counts of gross sexual imposition. The trial court sentenced him to seven (7) consecutive one-year terms.

Appellant has served approximately one year of his sentences but has been placed on parole.

THE ARGUMENT FOR PLENARY HEARING

1. THE MANNER IN WHICH PROSECUTION WAS COMMENCED IN THIS CASE VIOLATED THE APPELLANT'S RIGHTS UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY FAILING TO INFORM THE DEFENDANT OF THE NATURE AND CAUSE OF THE CRIME ALLEGED.

The charges against Appellant were initiated more than eighteen months after the last alleged physical contact with the victim. The Appellant was not indicted for these charges for a period in excess of one year after the matter had been reported and investigated by the Children's Services Bureau.

The prejudicial impact of such pre-indictment delay, by itself, constitutes cause for dismissal of an indictment in appropriate circumstances:

> "[T]he due process clause of the Fifth Amendment would require dismissal of the indictment if

> it were shown at trial that pre-indictment delay in this case caused substantial prejudice to appellee's right to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused."

United States v. Marion (1971), 404 U.S. 307, 324.

The 18-month delay was not inadvertent. It was employed as an "intentional device to gain tactical advantage over the accused." According to the Appellant's former spouse and mother of the alleged victim, the alleged criminal conduct was known to her, by December of 1983. The threat of disclosure of this alleged misconduct was used as a device to obtain an advantage in the divorce action pending from October, 1983 to June, 1984, yet no charges were brought to prosecution until January, 1985. As is typical of bitter domestic relations cases, confrontation continued. The threat

of disclosure and criminal prosecution was employed by the ex-wife, according to the testimony as part of a plan to destroy Appellant professionally and financially.

The Defense was disadvantaged not only by delay in the initiation of the prosecution. It was also confronted by the enormous difficulty of defending against seventeen vague and virtually identical charges, with each count of the indictment purporting to charge an offense which occurred at an unspecified time during a 457-day period. The Bill of Particulars offered no further information.

The vagueness and multiplicity of the charges, and the failure to particularize those charges by pleadings or evidence, violated one of the most fundamental rights assured a criminal defendant. The Sixth Amendment to the United States Constitution requires

that the accused be informed of the offense with which he is charged.

The Supreme Court of Ohio has held that due process requires a certain degree of specificity in indictments on child abuse cases, even when the child victim may not be able to identify exact times and dates.

> "This court would hasten to add that inexactitude, even where the state is simply unable to comply with times and dates more specific than those found in the indictment, may also prove fatal to prosecution. Such would be the case if the absence of specifics truly prejudices the accused's ability to fairly defend himself.

State v. Sellards (1985), 17 Ohio St.3d 169, 172.

The practical realities of modern professional practice are such that a person engaged in a profession may be uniquely capable of accounting for his whereabouts during many hours of the day. The Appellant, being a physician, could search hospital and/or

office records and files to establish an alibi defense. However, the Appellant could not avail himself of this capability because the inexactitude of the charges. This denied the Appellant the opportunity to fairly defend himself in violation of his Sixth Amendment rights.

2. THE ADMISSION OF TESTIMONY IN VIOLATION OF THE RULE PRECLUDING INTERSPOUSAL COMMUNICATIONS TESTIMONY VIOLATED THE FIFTH AMENDMENT RIGHT AGAINST SELF INCRIMINATION AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Over objection, Appellant's ex-wife was permitted to testify about communications made between her and Appellant during coverture, and not made in the known presence of third persons.

Under Ohio Evidence Rule 601(B), Appellant's ex-wife is considered competent to testify concerning crimes against the "children of either." The complaintant was the child of Appellant's ex-wife by a marriage previous to that with Appellant.

Competency does not mean, however, that interspousal privilege has been waived under Ohio law. See State v. Rahman (1986), 23 Ohio St.3d 146.

Revised Code §2945.42 precludes a spouse from testifying against the other regarding communications made during coverture and not made in the presence of a third person competent to be a witness.

An exception to that rule is when the testimony pertains to "...neglect or cruelty of either to <u>their</u> children under eighteen years of age..." This exception does not apply to the present facts since the complainant was the child of <u>only</u> the ex-wife.

It is the codified law of Ohio that offenses are to be strictly construed against and liberally in favor of the accused, and that criminal procedure and related sections of law shall be construed to insure fair, impartial and sure justice. See §2901.04 Ohio Revised Code. The failure of the State Court below to follow these principles has denied the Appellant due process

of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

The foundation of interspousal privilege is a conceptual view that spouses are an identity or one. In essence, one spouse talking to the other is equivalent to talking to one's self. This concept has been made a specific privilege under Ohio law, prohibiting use of interspousal statements in Court, with noted exceptions. To the extent that §2945.42 permits this breach of a criminal defendant's right against self-incrimination guaranteed by the Fifth Amendment to the United States Constitution is unconstitutional.

Further, as this Court held in Chapman v. California (1967) 386 U.S. 18, admissision of relevant evidence which may influence the jury cannot be considered harmless. The test to be

employed is whether the testimony admitted was harmless error beyond a reasonable doubt. Taking the trial record as a whole, in the absence of testimony of Appellant's wife, there is little, if any, evidence to support conviction beyond reasonable doubt. Therefore, by the test established by this Court, Appellant's conviction must be reversed and the evidence submitted by his ex-wife excluded.

3. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ADMITTING EDITED TAPE RECORDINGS OF TELEPHONE CONVERSATIONS BETWEEN APPELLANT AND HIS EX-WIFE IN VIOLATION OF THE APPELLANT'S RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Counsel for Appellee urged Appellant's ex-wife to tape record phone conversations between her and Appellant. Edited portions of those recordings were admitted after Appellant's Motion in Limine to have them excluded was overruled.

At hearing on said Motion, a complete transcript of the recorded conversations was received into evidence. Throughout the conversations, Appellant's ex-wife repeatedly accused Appellant of engaging in intercourse and other sexual activities with her daughter. The transcript reflects that on 79 occasions, Appellant denied these allegations and specifically denied the alleged

activities during the time covered by the indictments, i.e. June, 1982 to September, 1983. Appellant further stated that he had undergone polygraph examinations which corroborated his innocence.

The admission of the edited tapes, or even unedited tapes was a violation of Ohio Evidence Rule 404(B), because the statements taken into evidence and out of context were admitted to prove character and to show that Appellant acted in conformity with that character. The Supreme Court of Ohio has, on several occasions denied admission of evidence regarding prior and/or subsequent acts on the basis that a criminal defendant must only be tried for the acts for which he is charged. See State v. Curry, (1975) 43 Ohio St.2d 66 and State v. Thompson, (1981) 66 Ohio St.2d 496.

The admission of these edited tape recordings put the Appellant in the Hobson's choice of breaking his constitutionally protected right of silence, to take the witness stand and admit to prior misconduct and thus assure prejudicial evidence being presented to the jury, or remaining silent in the hope that the Law would protect his Constitutional rights and/or the jury be able to understand the distinction. Since the Courts of Ohio have not protected Appellant's Fifth Amendment right, Appellant must look to this Court for redress.

The admission of the taped evidence further violated Rule 403(A) which prohibits the introduction of relevent evidence, where its probative value is outweighed by its prejudicial effect. The edited taped conversations can, at best, be considered admissions of prior acts which while relevant, were

inestimably prejudicial to the Appellant. To the extent that said Rule of Evidence permits use of such edited tape recorded statements of a criminal defendant at his trial, said rule offends the Sixth Amendment to the United States Constitution by denying the criminally accused's right to trial by an impartial jury.

CONCLUSION

The State Courts throughout the United States are deluged with cases regarding alleged child sexual abuse. It has been popularly termed the crime of the 80's. This is overwhelmingly the situation where, as here, the setting for the alleged abuse takes place against the backdrop of divorced parents. Trial courts must balance protection of the rights of the accused with protection of the victim. The dilemma is caused by fear that the victim will be further traumatized by the judicial proceedings.

This fear tends to obscure the Constitutional protections the accused receives in the many other areas of criminal conduct. It is in this area where guidance from this Court is necessary. This may indeed not be the ideal case for this Court's review

of this area of law, but this Court, must, sooner or later, address these issues. For so long as there will be children and divorce, and so long as disputes both before and after the divorce decrees are rendered shall occur; there shall be cases such as the instant cause.

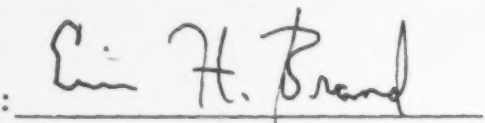
Even if the issues herein had nothing whatsoever to do with child sexual abuse, the admission of edited tape recorded evidence which conflicts with a criminal defendant's rights against self-incrimination and to have a fair and impartial jury requires this Court's review. Modern technology has created an entirely different evidence gathering capacity. The use of wire-tap evidence has been approved in appropriate cases. However, the use of recording devices to obtain evidence by private individuals who are intent upon creating evidence detrimental to the accused must be

scrutinized with great care. This Court must set forth parameters regarding such evidence or every citizen, including members of this Court, could have edited conversations, taken out of context, be used against them in a Court of law.

The Appellant respectfully requests that: this Court declare that to the extent the law of Ohio permits vagueness in indictments, the Constitutional rights of criminal defendants is abridged; this Court declare that to the extent that Ohio law permits use of interspousal communications in this factual context, said law is unconstitutional; this Court declare that to the extent that Ohio Rules of Evidence permit in this factual context, the use of edited tape recorded conversations in evidence, said Rules are unconstitutional, and, therefore, Appellant's convictions must be reversed.

For these reasons, the Appellant requests this Court give plenary review of this Appeal.

Respectfully submitted,

BY: 

Eric H. Brand
100 Washington Avenue
Greenville, OH 45331
(513) 548-2211

PROOF OF SERVICE

The undersigned does hereby certify that Appellant's Jurisdictional Statement has been served upon Counsel for Appellee, in accordance with U.S.Sp.Ct.R. 28.3, by depositing three copies of same in the United States mails, first class postage pre-paid, addressed to Walter F. Ruf and Ted E. Millspaugh, Assistant Prosecuting Attorneys for the State of Ohio, Suite 300, Montgomery County Courthouse, Dayton, Ohio 45402 on the 6th day of July, 1987.

Eric H. Brand

Eric H. Brand
100 Washington Avenue
Greenville, OH 45331
(513) 548-2211

CASE NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

October, 1987 Term

STATE OF OHIO, :

Plaintiff-Appellee :

vs. :

ROBERT N. BEREZOSKI, :

Defendant-Appellant :

On Appeal from the Ohio Court of Appeals
Second District

OHIO SUPREME COURT CASE NO: 87-278
OHIO APPEALS CASE NO: 9568
OHIO TRIAL CASE NO: CR 2218

ENTRY OF COUNSEL APPEARANCE

Now comes Eric H. Brand, Esquire who was duly admitted and qualified to practice before this Honorable Court on December 7, 1981, and herewith enters his appearance as Counsel of record for the Appellant, Robert N. Berezoski.

/s/ Eric H. Brand
Eric H. Brand
100 Washington Avenue
Greenville, Ohio 45331
Telephone: (513) 548-2211

PROOF OF SERVICE

The undersigned does hereby certify that a copy of the foregoing Appearance was forwarded by ordinary U.S. Mail, postage prepaid to WALTER F. RUF and TED E. MILLSPAUGH, Assistant Prosecuting Attorneys for the State of Ohio, Suite 300, Montgomery County Courthouse, Dayton, Ohio 45402 this 6th day of July, 1987.

/s/ Eric H. Brand
Eric H. Brand

Filed with the Clerk of the Supreme Court of the United States on July 7, 1987.

IN THE SUPREME COURT OF OHIO

CASE NO. 87-278

STATE OF OHIO	:
Plaintiff-Appellee	:
vs.	:
ROBERT N. BEREZOSKI	:
Defendant-Appellant	:

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA FROM THE SUPREME COURT OF OHIO

Now comes the Appellant, ROBERT N. BEREZOSKI, and gives Notice of Appeal to the Supreme Court of the United States of America, pursuant to 28 U.S.C. §1257(2), from the Judgment entered in the Supreme Court of Ohio, on the 8th day of April, 1987.

This case draws in question the validity of State Statutes and Rules of Evidence on the ground of repugnancy to the United States Constitution.

/s/ Eric H. Brand
Eric H. Brand
100 Washington Avenue
Greenville, Ohio 45331
Telephone: (513) 548-2211

CERTIFICATE

The undersigned does hereby certify that a copy of the foregoing Notice was forwarded by ordinary U.S. Mail, postage prepaid to WALTER F. RUF and TED E. MILLSPAUGH, Assistant Prosecuting Attorneys for the State of Ohio, Suite 300, Montgomery County Courthouse, Dayton, Ohio 45402 this 6th day of July, 1987.

/s/ Eric H. Brand
Eric H. Brand

Filed with the Clerk of the Supreme Court of the United States on July 7, 1987; with the Clerk of the Supreme Court of Ohio and the Clerk of the Court of Appeals for the Second District of Ohio on July 6, 1987.

THE SUPREME COURT OF OHIO

COLUMBUS

1987 TERM

To wit: April 8, 1987

Case No. 87-278

STATE OF OHIO, :
Appellee, :

v. : ENTRY

ROBERT N. BEREZOSKI, :
Appellant. :

Upon consideration of the motion for leave to appeal from the Court of Appeals for Montgomery County, and the claimed appeal as of right from same said Court, it is ordered by the Court that said motion is overruled and that the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therien.

COSTS:

Motion Fee, $20,00, paid by Rion, Rion & Rion.

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

I, Robert L. Edington, Acting Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copies from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this date _____.

ROBERT L. EDINGTON Acting Clerk

/s/ J. A. Redd Deputy

IN THE COURT OF APPEALS
SECOND APPELLATE DISTRICT OF OHIO
MONTGOMERY COUNTY, OHIO

CASE NO. 9568

STATE OF OHIO *

Plaintiff-Appellee *

-vs- *

ROBERT N. BEREZOSKI *

Defendant-Appellant *

NOTICE OF APPEAL
TO THE SUPREME COURT
OF OHIO FROM THE
COURT OF APPEALS
FOR THE SECOND
APPELLATE DISTRICT
OF OHIO

Now comes the Appellant, DR. ROBERT N. BEREZOSKI, and gives Notice of Appeal to the Supreme Court of Ohio from the Judgment entered in the Court of Appeals of Montgomery County, Ohio, on the 30th day of December, 1986.

This case involves substantial constitutional questions and matters of great general interest.

/s/ John H. Rion
JOHN H. RION of
RION, RION AND RION CO.,
L.P.A.
Attorneys for Defendant
Appellant
Suite 1630
One First National Plaza
P.O. Box 1262
Dayton, OH 45402
(513) 223-9133

C E R T I F I C A T E

I hereby certify that a copy of the above Notice was delivered to the office of Plaintiff-Appellee's attorney on this day of filing.

/s/ John H. Rion
JOHN H. RION

ASSIGNMENTS OF ERROR FILED IN THE COURT OF APPEALS

First Assignment of Error

IN VIOLATION OF DUE PROCESS OF LAW, THE OPPORTUNITY TO PARTICIPATE EFFECTIVELY IN THE FACT-FINDING PROCESS OF TRIAL WAS DENIED.

A. Commencement of Prosecution was Intentionally Delayed for the Purpose of Prejudicing Appellant.

B. The Indictment Failed to Afford Adequate Notice.

C. The Trial Court Imposed Unreasonable Restrictions Upon Cross-Examination of Appellant's Principal Accuser.

Second Assignment of Error

THE TRIAL COURT ERRONEOUSLY PERMITTED THE PROSECUTOR TO ATTACK THE CREDIBILITY OF A DEFENSE WITNESS AND THE INTEGRITY OF DEFENSE COUNSEL IN A MANNER WHICH VIOLATED RULES 403, 408, AND 609 OF THE OHIO RULES OF EVIDENCE.

Third Assignment of Error

THE COURT REPORTER'S FAILURE TO RECORD CRITICAL PORTIONS OF THE TRIAL OPERATED TO DENY APPELLANT THE RIGHT TO EFFECTIVE APPELLATE REVIEW.

Fourth Assignment of Error

THE TRIAL COURT ERRONEOUSLY ADMITTED SELECTED PORTIONS OF TAPED

CONVERSATIONS WHICH HAD BEEN SURREPTITIOUSLY RECORDED BY APPELLANT'S EX-WIFE UPON INSTRUCTION OF THE PROSECUTOR.

A. Admission of Ambiguous Statements Uttered by the Defendant Concerning Acts Other Than Those Charged in the Indictment Violates Rule 404(B) of the Ohio Rules of Evidence.

B. Admission of Appellant's Utterances, Recorded by his Ex-Wife Pursuant to Instructions of a Prosecutor Anticipating Presentation of Charges Against Appellant to the Grand Jury, Violated Appellant's Right to Counsel.

C. Allowing the Prosecutor to Excerpt Portions of Many Hours of Tape Recorded Conversations, in a Manner Which Distorted the Meaning of Recorded Utterances, Operated to Deny Appellant a Fair Trial.

Fifth Assignment of Error

THE PROSECUTORS ENGAGED IN A PATTERN OF MISCONDUCT WHICH DENIED APPELLANT A FAIR TRIAL.

A. The Prosecutors, Without Just Cause and by Impermissible Means, Attacked the Integrity of Defense Counsel and the Credibility of All Defense Witnesses.

B. The Prosecutor Repeatedly Violated the Fifth Amendment

by Commenting Upon the Fact that Appellant did not Testify at Trial.

C. The Prosecutor Improperly Expressed Personal Opinions on the Credibility of Witnesses and the Weight of the Evidence, Improperly Acted as Witness Rather than Advocate, and Sought to Inflame the Jurors.

Sixth Assignment of Error

THE CHARGE TO THE JURY, THE TRIAL COURT DENIED APPELLANT DUE PROCESS OF LAW BY RELIEVING THE STATE OF THE BURDEN OF ESTABLISHING GUILT BY PROOF BEYOND A REASONABLE DOUBT.

A. The Court Erroneously Failed to State the Meaning of the Presumption of Innocence.

B. The Instruction on the Burden of Proof Relieved the State of the Burden of Proving Guilt Beyond a Reasonable Doubt.

C. The Trial Court Erroneously Failed to Charge the Jury on the Manner in Which a Child's Testimony was to be Weighed.

Seventh Assignment of Error

APPELLANT WAS SENTENCED UNLAWFULLY

Supplemental Assignment of Error

THE TRIAL COURT ERRED BY ALLOWING APPELLANT'S EX-WIFE TO TESTIFY AGAINST HIM BECAUSE THAT TESTIMONY WAS PRIVILEGED COMMUNICATION THAT

IS PROTECTED UNDER REVISED CODE §2317.02.

IN THE COURT OF APPEALS OF
MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee :

vs. :

ROBERT N. BEREZOSKI :

Defendant-Appellant :

CASE NO. 9568

(C.P. #84-CR-2218)

.....

OPINION

Rendered on the 17th day of December, 1986

.....

LEE C. FALKE, Prosecuting Attorney for Montgomery County, Ohio, by: TED E. MILSPAUGH and WALTER F. RUF, Assistant Prosecuting Attorneys, Appellate Division, Montogomery County Administration Building, Post Office Box 972, 451 West Third Street, Dayton, Ohio, 45422
Attorney for Plaintiff-Appellee

JOHN H. RION of RION, RION & RION CO., L.P.A., Suite 1630, One First National Plaza, P.O. Box 1262, Dayton, Ohio 45402
and
GERALD A. MESSERMAN of MESSERMAN & MESSERMAN CO., L.P.A., 1525 Ohio Savings Plaza, Cleveland, Ohio 44144
Attorneys for Defendant-Appellant

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BROGAN, P.J.

Appellant, Robert N. Berezoski, was indicted by the Montgomery County Grand Jury for ten counts of Rape in violation of R.C. 2907.02(A)(3) and seven counts of Gross Sexual Imposition in violation of R.C. 2907.05(A)(3). The indictment alleged that the victim of these offenses was Erin Rothwell (the appellant's stepdaughter) and that the offenses occurred between June 1, 1982 and September 1, 1983.

The matter was tried by a jury, and the appellant was convicted of the seven counts of gross sexual imposition. Appellant was acquitted of the rapes. Appellant was sentenced to seven consecutive one (1) year terms. Appellant has timely appealed and asserted nine assignments of error.

Appellant is a 40 year old, board certified plastic surgeon and otolaryngologist. Prior to his conviction he had engaged in the private practice of medicine with staff privileges in many area hospitals. The victim in this case was the appellant's stepdaughter, Erin Rothwell, who was born on June 12, 1973. Appellant and Diane Berezoski were married on March 7, 1978. At the time of their marriage, appellant had three children from his first marriage, John, Robert, and Cheryl Berezoski. Diane Berezoski had two children from a second marriage, Amy and Erin Rothwell. Appellant and Diane had a child of their marriage, Katherine, age five years. Appellant and Diane were divorced in June of 1984.

Erin Rothwell testified that her sexual activity with her stepfather occurred from the summer after her

third grade (June 1982) until sometime at the end of the summer before her fifth grade school years. (September 1983). She stated the activity occurred at their home, the Windmill House, and at appellant's office in Centerville and Xenia, Ohio. Erin testified that appellant on some occasions inserted his penis into her, sometimes had her fellate him or engage in oral sex, and on other occasions he inserted his finger into her vagina or otherwise touched her in the vaginal area.

Erin testified that on one occasion prior to her fourth grade, after appellant had put his penis in her mouth, her mother came into her room as appellant was leaving. Diane asked her about what appellant was doing, and Erin denied anything out of the ordinary occurred. In late November 1983, after appellant and Diane had separated, Erin told her mother of

appellant's activity. She was then referred to Cicely Nathan for psychological counseling.

Diane Berezoski testified during a separation from the appellant in early December 1983 she went to see Gordon Harris, a psychologist, who was also treating appellant. After that meeting, she stated she suspected her husband of abusing Erin and she confronted him. She stated that appellant tearfully admitted he had sexually molested Erin with his fingers and hands in her genital area, but that it had all halted in the summer of 1983. (Tr. 191-192). She said Erin then told her that appellant had touched her between the legs and places, put his fingers in me." (Tr. 193).

Ms. Berezoski stated she took Erin in early 1984 to see Cicely Nathan for therapy. She then learned from Ms. Nathan that appellant had engaged

in sexual intercourse and oral sex with Erin. She stated that appellant admitted to her on a number of occasions in February and March 1984 that he had fondled Erin and engaged in oral sex, but appellant denied having intercourse with her. (Tr. 208).

Ms. Berezoski then contacted a sheriff's deputy about the sexual abuse in November, 1984. She stated she had filed no report sooner because of her concerns for the psychological condition of her daughter. (Tr. 230). At the request of the prosecutor, she taped all phone calls from the appellant from December 30, 1984 until January 7, 1985. (State's Exhibit 9, 19, and 21). In these taped conversations, appellant denied having engaged in sexual intercourse with Erin, but expressed guilt over other acts of sexual fondling or touching of the child.

Dr. Parvis Daneshjoo a board certified obstetrician gynecologist, testified he examined Erin Rothwell in December 1984. He stated he exmained the vaginal area of Erin and found the hymen had been penetrated and there were remnants of hymenal tags. (Tr. 325). He stated the child's vaginal opening was much wider and dilated than normal for an eleven year old child. He stated the hymenal tags were evidence of scarring or tearing of the hymen. He stated the hymenal tags were caused by the insertion of an object into the hymen. He stated the hymenal tearing would not have been caused by a bike accident. He stated her absence of an intact hymen was consistent with vaginal penile intercourse. (Tr. 329). He stated her hymenal tags were consistent with repeated object insertion.

Daneshjoo stated in his examination report that there was definitely an

indication of some previous sexual relationship and hymenal penetration. (Tr. 340).

Dr. Beverly Ungerleider, a board certified pediatrician, testified she examined Erin Rothwell in Feburary (sic) 1985 and found the hymenal tags. She made the same observations as Dr. Daneshjoo. She also discounted a bike accident. She stated Erin's condition was consistent with penile penetration. Cicely Nathan, a clinical psychologist, of 36 years experience, testified she had considerable experience with sexually abused children. She said clinical tests indicated that Erin Rothwell had a personality pattern consistent with having been sexually abused. (Tr. 391). She stated that Erin told her in one of her later therapy sessions that appellant had sexually abused her - initially of fondling, touching, and fingering and that later he engaged

in vaginal intercourse and oral sex with her. (Tr. 396-398). Ms. Nathan stated she informed Erin's mother about the allegation of oral sex and she appeared to be stunned by the revelation. (Tr. 399).

Ms. Nathan stated in her professional opinion Erin Rothwell had undergone not only sexual fondling but vaginal penile intercourse and sex. (Tr. 401).

Alberto Pino, an intake investigator for the Children's Services Bureau, testified that on December 16, 1983, he received a call from Dr. Gordon Harris who reported a sexual abuse of Erin Rothwell. Harris reported that the abuser was the child's stepfather who is a physician. "The type of contact was general to manual contact such a fondling and touching. According to Bob, nothing has happened recently. No sexual contact for 9 months to a year, Bob says. The

stepfather's name is Robert Berezoski...." (State's Exhibit 13). Pino stated the case was closed two weeks later because child was in custody of mother and Dr. Berezoski was in therapy.

The defense presented the testimony of Drs. Lawrence Gould an obstetrician/gynecologist and Max Blue, a genital surgeon, who both testified Erin's condition could have resulted from something other than sexual intercourse. Dr. Gould said a severe bike accident could cause Erin's hymenal tags to tear. (Tr. 479).

Drs. Warren and Marilyn Shea testified they examined Erin Rothwell at length and in their opinion she had not been the victim of sexual abuse. They both found multiple inconsistencies in Erin's version of her abuse, and that she didn't fit the profile of an abused child.

Geoffrey Doyle, Jr., a friend of the Berezoski family stated that Erin told him that the charges against appellant were untrue, and her mother was making her lie. (Tr. 819). Doyle said Diane Berezoski told him she was telling Erin what to do and what to say "so we can take this man to court and win." (Tr. 820).

Appellant's children, John, Robert, and Cheryl Berezoski all testified that Erin had told them that the things she was saying about appellant was untrue, and that her mother was making her lie. (Tr. 900, 915-16, 928). Christy Collins, a friend of Erin's corroborated the testing (sic) of appellant's children. (Tr. 951).

Against the backdrop of testimony we now examine the assignments of error raised by the appellant in his appeal.

In his first assignment of error, appellant contends the trial court

erred in permitting the prosecutor to attach (sic) the credibility of a defense witness and the integrity of a defense counsel in a manner which violated Rules 408 and 609 of the Rules of Evidence.

The defense called Max E. Blue, Jr., a board certified urologist and genital surgeon, to the stand. Defense counsel established through testimony that Dr. Blue was a member of the staff of many local hospitals. Defense counsel, Mr. Rion, asked Dr. Blue if it wasn't true that they had become acquainted as neighbors and through the respective children's school activities. He also asked him if it wasn't true that "we have consulted in the past on different situations?" (Tr. 496).

Dr. Blue stated he contacted Mr. Rion at 11:30 p.m. the night before testifying to inform him that he was

appalled at certain testimony given by Dr. Ungerleider which had been replayed on television that night. In particular, Dr. Blue stated that he was appalled at the inference made by Dr. Ungerleider that when hymenal tears are present it could only have occurred with penile pentration. He stated in his experience as a urologist such tears occur frequently in children 2-12 years with no sexual relation of any sort being involved. (Tr. 497). Dr. Blue stated the hymenal ring is frequently torn through the child's own exploration or inspection.

On cross-examination, Dr. Blue admitted he had only seen a brief TV clip of Dr. Ungerleider's testimony, and it was possible that a penis could have caused the child's hymenal tears. (Tr. 504). The prosecutor then asked Dr. Blue if he had been represented by Mr. Rion before. Dr. Blue stated

he had been a legal counsel of his as well as many other lawyers in the courthouse. (Tr. 505).

The following exchange between the prosecutor and Dr. Blue occurred:

> (Prosecutor) Q. How many times has Mr. Rion represented you?
>
> (Blue) A. He has represented me once and I have done several cases of consultation work for him.
>
> Q. I see. And was that matter that he represented you in a civil case or a criminal case?
>
> A. It was a personal matter.
>
> Q. Was it a civil case or a criminal case?
>
> MR. RION: Your Honor, I think the witness can--well, let's approach the bench.
>
> THE COURT: The Court would overrule the objection and the Doctor is subject to cross-examination. This is a fair question.
>
> A. Fine, I'll answer your question.
>
> BY MR. COUGLIN
>
> Q. Then please do.

A. I underwent an investigation by the Dayton Police Department about six years ago.

Q. So it was a criminal case?

A. It was a criminal case. I was never charged. There were no findings of any sort whatsoever. I also voluntarily submitted my evidence to also the United States District Attorney and on the basis of that information, they saw no reason to pursue this matter because they did not feel I committed any criminal action.

Appellant argues that the prosecutor's exploration of Dr. Blue's involvement in a criminal investigation violated the express command of Rule 609(A) of the Rules of Evidence. That Rule provides:

> For the purpose of attacking the credibility of a witness, evidence <u>that he has been convicted of a crime</u> shall be admitted if elicited from him or established by public record during cross-examination * * *. (Emphasis added).

Appellant argues the cross-examination of Dr. Blue concerning Dr. Blue's involvement in a criminal investigation

which did not result in conviction constitutes reversible error. Also the appellant contends the prosecutor's violation of Rule 609 was employed to achieve the far more ambitious objective of undermining the integrity of the entire defense. The appellant points to the prosecutor's final argument:

> [W]e hid nothing from you, and Diane certainly hid nothing from you, unlike Dr. Rion, or, excuse me, Mr. Rion who puts on Dr. Blue and fails to kind of mention to you that he has represented the man in a criminal matter. He never brought that out, did he? Only upon cross examination was that brought out. (Tr. 1078).

The State argues that there was no violation of Evid. R. 609 because the prosecutor was not attempting to impeach Dr. Blue with evidence that he had been convicted of a crime because it was obvious that he had not been convicted. The State argues that it was legitimately attempting to

investigate the relationship between the witness and the defense counsel for credibility purposes, as well as for potential bias when the information about the criminal representation came out. The State argues that the cross-examination testimony at issue clearly established that the witness' relationship to defense counsel was a great deal closer than the casual acquaintance alluded to upon direct examination.

We are not privy to the bench conference which apparently occured prior to the court's overruling the defendant's objection to the prosecutor's inquiry of Dr. Blue. We must speculate therefore why the court found the prosecutor's question to be a "fair" one. (See Tr. 504). We are unaware of whether the Court was apprised of what the witness' answer would be.

The relationship between counsel and client in a criminal investigation is often much closer than in the representation of mere civil matters. The question therefore was relevant to the issue of the witness' bias and credibility. See Evid. R. 611(B). Weighed against that must be consideration of the inquiry's impact upon the jury. The witness stated he was investigated by two police agencies and exonerated. The jury was left to speculate what the investigation concerned.

The trial court has broad discretion in the admission and exclusion of evidence and unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, this court should be slow to interfere with that judgment. State v. Hymore (1967), 9 Ohio St. 2d 122. While we believe the prejudicial effect of the

prosecutor's question outweighed the probative value the answer evoked, we believe the error to be harmless. Dr. Blue's testimony was offered to refute evidence of rape as offered by Dr. Ungerleider and Dr. Daneshjoo. Apparently Dr. Blue's testimony had an impact on the jury, for they acquitted the appellant of the rape charges. Appellant has failed to demonstrate any prejudice in the question propounded by the prosecution.

Appellant also contends in this assignment that the trial court erred in admitting rebuttal evidence, State's Exhibit 23, an agreement between Dr. Blue and Kettering Medical Center wherein Dr. Blue would resign his medical staff privilege with that hospital. The agreement was dated March 18, 1981. The defense timely objected to the admission of the exhibit.

In final argument, the prosecutor argued as follows:

> You know, what's appalling is that he [Dr. Blue] would even come in here and give you an opinion. That's what is appalling, this urologist, and what's even more appalling is that Mr. Rion doesn't even tell you before he gives the opinion that he has represented him on a federal criminal matter, which Dr. Blue says was a personal matter. Mr. Rion further doesn't tell you what is now in evidence, the State's Exhibit 23, an agreement that Dr. Blue was relieved of his privileges at Kettering Medical Hospital. Let me just read it to you. (Tr. 1081-1083) (Emphasis added).

Appellant argues that the Exhibit should not have been admitted because it was not relevant as rebuttal evidence and violates the Evid. R. 408 on compromise. Appellant argues the admission of the exhibit constitutes plain error requiring reversal.

The State argues that the exhibit was admissable as rebuttal because Dr. Blue recited a list of hospitals on whose staff he served and failed

to mention Kettering Memorial Hospital. Since the witness testified on such short notice to the State, it could not cross-examine about his resigning his privileges at Kettering. Also the State argues Evid. R. 408 has no application to criminal matters and was not offered to establish liability or invalidity.

We believe the trial court abused its discretion in admitting State's Exhibit 23. The exhibit speaks of Dr. Blue's suspension and the agreement to compromise or settle his dispute with the hospital by his agreement to resign medical staff privileges. The jury is left to speculate why Dr. Blue agreed to resign. The exhibit rebutted nothing which Dr. Blue offered in his testimony. However, for the reasons stated in our treatment of the previous evidentiary matter, we find no material prejudice to the

appellant by the exhibit's admission. Dr. Blue's testimony was apparently accorded credibility. The first assignment of error is overruled.

In his second assignment of error, appellant contends the prosecutors engaged in a pattern of misconduct which denied him a fair trial.

Dr. Laurence Gould, a board certified obstetrician, testified that Erin Rothwell's physical condition did not demonstrate that she had experienced any sexual experiences or activity. (Tr. 477). Dr. Gould stated he found no evidence of trauma to indicate sexual activity (Tr. 478) but he did find evidence of hymenal tags. He stated Erin's condition could have been caused by a severe bike accident or penile penetration. (Tr. 480). He stated if Erin had engaged in sexual intercourse a year and one-half prior to his examination of her, no evidence of

lacerations or trauma would be present. (Tr. 487).

Gould stated his office was located at Piqua, Ohio and that his expertise involved the whole practice of obstetrics and gynecology. (Tr. 476). He stated he operated a clinic for Women's Services in Dayton, Ohio. (Tr. 476). He stated his examination of Erin Rothwell was the first he ever conducted for "sexual abuse." (Tr. 486).

On cross-examination, the prosecutor asked Dr. Gould if he performed abortions. No objection was made to the question. Dr. Gould answered in the affirmative. He was asked it it was not true that 80% of his practice was abortions. Again no objection was interposed. Dr. Gould stated that about twenty percent of his practice was devoted to abortions. (Tr. 487).

Appellant contends that the prosecutor was uable to attack Dr. Gould's testimony

on any other ground so he resorted to attacking Dr. Gould and the lawyer who had the audacity to present his testimony. Appellant refers us to the prosecutor's final argument:

> Who does the defense call? These supposedly respected figures in this community. He goes all the way up to Piqua to find a medical doctor who will come in and testify for you, Dr. Gould. This is a man whose only contact with the community is his "Women's Services Clinic". That's where he performs his abortions. Rightly or wrongly, that's his only contact with this area, * * *. (Tr. 1080).

Appellant contends this line of questioning and argument inpugned the integrity of defense counsel and sought to inflame the passions of the jury on a highly controversial issue.

While appellant contends the prosecutor engaged in egregious conduct, no objection was made to the prosecutor's line of inquiry. An appellate court need not consider an error which a party complaining of the trial court's

judgment could have called, but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court. State v. Williams (1977), 51 Ohio St. 2d 112.

It is also curious to note that appellant's counsel inquired of Dr. Parviz Daneshjoo if he had been involved in an abortion clinic in 1978. Dr. Daneshjoo denied he had been so involved. (Tr. 337).

Both inquiries by counsel appear to have been "loose cannons" with little to back up their questions. Dr. Daneshjoo denied it, Dr. Gould stated only 20% of his practice was devoted to it. Certainly it was relevant to inquire as to the percentage of practice dedicated to abortions if it consumed the vast majority of the physician's practice, leaving him little room to

give an expert opinion in the area under question, i.e. sexual abuse.

There is little doubt that the question of abortion is a highly emotional issue for some members of the community. The relevancy of an inquiry in this area must be approached with some concern that its relevance or probative value is not outweighed by its prejudical effect.

This jury appears to have given little weight to this line of questioning. Both Dr. Gould and Dr. Blue offered testimony that placed in doubt the testimony of Erin Rothwell, Drs. Ungerleider and Daneshjoo that Erin had been raped. The jury acquitted appellant on those charges.

While we believe the prosecutor's final argument as to Dr. Gould's respect in Montgomery County to have been objectionable, no objection was interposed by counsel. No prejudice

can be demonstrated by the questioning or the argument.

Appellant contends the prosecutor unfairly accused defense witness, Drs. Marilyn and Warren Shea as "dishonest advocates." Appellant points to a portion of the prosecutor's final argument:

> I lost some innocence during this trial. You know, I thought experts were supposed to come in here and report their findings, report their diagnosis, and tell you how they arrived at their diagnosis, * * *. I didn't know they were supposed to be advocates, come in here and give opinions on anything and everything. (Tr. 1084-85).

No objection was made by defense counsel to this argument by the prosecutor. The prosecutor did not call Drs. Shea "dishonest advocates." In State v. Stephens (1970), 24 Ohio St. 2d 76, the Supreme Court stated:

> In the tensions and turmoil of trial both the prosecutor and defense have wide latitude in summation as to what the evidence

has shown and what reasonable inferences may be drawn therefrom.

Counsel did define advocacy "as giving opinions on anything and everything." The Sheas did offer their opinion that Erin Rothwell had not been sexually molested. They were called to offer their opinion on that very question. The line between advocacy and opinion is a narrow one at best. The jury could determine whether the prosecutor's argument was fair. We find nothing prejudical in the argument.

Geoffrey Doyle Jr. testified that he was an acquaintance of the appellant and his wife, Diane. He stated that Diane Berezoski told him that appellant had sexually abused their child, Erin. Doyle stated he asked Erin about this because he couldn't believe it. He said Erin denied that appellant abused her (Tr. 819). He said Erin told him that "her mommy was putting her up

to it," and not to tell her mother because she would get "real mad." (Tr. 819). He stated Diane Berezoski told him, "Look, I'm telling Erin what to do and what to say so we can take this to court and win. (Tr. 820).

Doyle stated his conversation with Erin occurred in late October or early November 1984. Appellant contends the prosecutor attacked Doyle's testimony by suggesting that Doyle and defense counsel had fabricated the whole story. Counsel refers us to this testimony:

> Q. When did you tell Mr. Rion that you knew all these things?
>
> A. In February of '85.
>
> Q. All the way back then, huh?
>
> * * *
>
> Q. Did Mr. Rion tell you let's go to the Prosecutor this week; gee, we should have done it before? (Tr. 829-30).

We cannot glean from this trial testimony any hint that prosecution

was implying that defense counsel had suborned perjury from the witness.

Kim Allen, Doyle's fiance, corroborated Doyle's testimony concerning Diane Berezoski's statement she would ruin appellant. Appellant objects to the prosecutor's closing argument.

> It [Doyle's testimony] is an outright lie. And Kim's testimony is an outright lie. (Tr. 1089).

There was no objection by defense counsel to the prosecutor's remarks. Furthermore, a review of the record of the final argument reveals the prosecutor discussed at length the reasonableness of Doyle's and Allen's testimony. (See 1088, 1089). The prosecutor argued Doyle's testimony was unreasonable because Erin was shown to be a withdrawn child, that Doyle told no one about Erin's admissions to him for nearly two years. The prosecutor also argues it was not reasonable that Diane Berezoski would

tell a man she hardly knew and who was a friend of appellant that she was out to ruin appellant. That it ws not reasonable that Diane would make such a "statement" in front of a perfect stranger, Kim Allen. The prosecutor argues that the testimony was not "believable." (Tr. 1089).

The test regarding prosecutorial misconduct in closing arguments is whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the defendant. State v. Smith (1964), 14 Ohio St. 3d 13, citing with approval United States v. Dorr (C.A. 5, 1981), 636 F. 2d 117.

Counsel is free to argue that the evidence demonstrates that certain witnesses are not worthy of belief. While stating that the witness is an outright liar is intemperate, it is permissible if stated in the context

of testimony which may be unreasonable or unbelievable in light of the facts before the jury.

Appellant argues that the prosecutor accused the defense counsel of distorting truth and suggested that counsel would do so whenever he was able (see brief at p. 20):

> [Y]ou beeter be darn sure that I'm going to be sure to get that [conversation with Dr. Berezoski] on tape, and I'm glad I did because <u>if it wasn't on tape, you better believe Mr. Rion would be arguing his client never said the things that were on that tape</u>. (Tr. 1116) (Emphasis added).

It is clear that in final argument defense counsel, Mr. Rion, attached the credibility of Diane Berezoski. Basically counsel argued that Diane was a woman scorned by appellant, and out of jealousy and spite she caused her daughter, Erin, to make unfounded charges against appellant. In addition, counsel asked why if the prosecutor felt he had such a good case, he would

use Diane Berezoski to trap appellant by taping phone conversations. (Tr. 1096).

The prosecutor in response to the defense counsel argued that Diane's conversations with her husband were taped because it was anticipated that defense counsel would attack Diane Berezoski's credibility concerning her alleged admissions of sexual activity by the appellant. We do not view the above quoted remarks by the prosecutor to be an attack upon the integrity of the defense counsel. Also defense counsel did not object to the prosecutor's remarks.

Appellant contends finally that the prosecutor repeatedly violated the Fifth Amendment by commenting upon the fact that appellant did not testify at trial. The appellant did not testify. Appellant argues that the prosecution engaged in argument which "was manifestly

intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." Citing, State v. Cooper (1977), 52 Ohio St. 2d 163.

Appellant objects to the following argument of the prosecutor:

> Let's talk about the Defendant's credibility. First he says, yeah, I did it, he admits it, in is on the tape, he can't change it. Then he turns right around and comes into this courtroom and tells you he did nothing. Now, you believe that? Think about it. Think about his credibility. (Tr. 1077).

This agrument was objectionable because it was not based upon evidence before the jury. The defendant did not testify. He did not come into the courtroom and tell the jury he did nothing. No objection however was made by counsel to this argument. We do however view this argument as "manifestly intended to be a comment

on the failure of the accused to testify. If anything it was a comment on testifying, which of course, he did not.

Appellant objects to the prosecutor's argument concerning the testimony of the appellant's children:

> Finally, he is so sad he calls his own children, this user of people, and he asks his own children to bear the burden of his defense and lets them be photographed, sadly, so sadly. He couldn't stand the weight of that burden. (Tr. 1089-90) (Emphasis added).
>
> * * *
>
> What we won't tolerate is this man, we won't tolerate that, calling your own children to bear the burden of your defense when you know it is a pack of lies, when you have them relate a story which you say on tape never occurred, that you never knew about. That is his character. (Tr. 1091) (Emphasis added).

Again the defense did not object to these arguments by the prosecutor. Absent plain error, this alleged error may be disregarded. Crim. R. 52(B)

states: "Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court.

Notice of plain error under Crim. R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. State v. Long (1978), 53 Ohio St. 2d 91 at syllabus 3.

The United States Supreme Court in Griffin v. California (1965), 380 U.S. 609, 615, held:

> [T]hat the Fifth Amendment, in its direct application to the Federal Government and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.

Was the prosecutor's argument manifestly intended or of such character that the jury would naturally and

necessarily take it to be a comment on the failure of the accused to testify?

The State argues that the comments were not but were rather statements concerning the failure of the evidence to support the defendant's theory of the case and was directed to the reliability of the children's testimony. While we could interpret part of the prosecutor's comment on the children's testimony to be disgust at defendant's subjecting the children to testify when the prosecutor viewed the defendant's answers on the tape recording to be some admission of guilt, the comment "He couldn't stand the weight of that burden [of his defense] can certainly be characterized as comment on the failure of the defendant to testify. We note also that no cautionary instruction was given to the jury at the conclusion of the case that they were not to to (sic) consider for any

purpose the fact that the defendant did not testify.

In Chapman v. California (1967), 386 U.S. 18, the United States Supreme Court held that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt; that the question is whether there was a reasonable possibility that references to defendant's failure to testify must have contributed to his conviction; and that the prosecutor is required to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

In Chapman, id., counsel did not object when the prosecutor commented on the accused's failure to testify or when the court instructed the jury that they could consider the accused's failure to testify in arriving at their

verdict in the case. The argument of counsel and the instruction given by the court was commonplace prior to the Supreme Court's decision in Griffin v. California, supra. The decision in Griffin was not announced until after the trial of Chapman.

In O'Connor v. Ohio (1966), 585 U.S. 92, the Supreme Court held that the failure of counsel to object was excused when the federal constitutional right in question (in that it was Griffin v. California) had not yet been announced. Accord see State v. Jones (1965), 4 Ohio St. 2d 13 (concurring opinion) see also, State v. Cowans (1967), 10 Ohio St. 2d 96 (failure of counsel to claim the benefits of Massiah v. United States, 377 U.S. 201).

In State v. Long (1978), 53 Ohio St. 2d 91, the Supreme Court held that a jury instruction which improperly

places the burden of proof upon a defendant "does not constitute plain error or defect under Crim. R. 52(b) unless, but for the error, the outcome of the trial clearly would have been otherwise." See also, State v. Underwood (1983), 3 Ohio St. 3d 12.

Appellant contends that the prosecutor's argument was an egregious violation of Griffin v. California, yet he interposed no objection. He did not request an immediate cautionary instruction by the court that the accused had a right not to testify and his failure to do so could not be used by the jury for any purpose. Counsel did not request a similar instruction be given during the court's final instructions to the jury, although such instruction would be required upon request. See, State v. Fanning (1982), 1 Ohio St. 3d 19, citing Carter v. Kentucky (1981), 450 U.S. 288.

It is also interesting to note that counsel did not move for a mistrial. Perhaps counsel felt that the trial had proceeded well and acquittal on all charges was to be his client's fate. Can counsel hold his objections in his hip pocket and when the verdict is not as hoped for spring them for the first time on appeal. We think not.

In State v. Craft (1977), 52 Ohio App. 2d 1, Judge Black of the First District Court of Appeals wrote an excellent decision defining the terms, harmless error, preserved error, waived errors, and plain error. Judge Black noted at page 5, 6, and 7 of his opinion:

> The plain error exception to the general rule is exercised cautiously. There must be "clear miscarriage of justice" (McIntyre v. United States [C.A. 8, 1967], 380 F. 2d 822, 825., n.1), "error both obvious and substantial" (Sykes v. United States [C.A. 5, 1966], 373 F. 2d 607, 612), "grave errors which seriously affect substantial rights of

the accused" (Wright v. United States [C.A. 10, 1962], 301 F. 2d 412, 414), and the like. But these expressions are too broad to afford a workable guideline for identifying plain error. A common theme is that it takes an exceptional case to overcome the traditional reluctance both to rule on a constitutional issue and to note on appeal what the lower court had no opportunity to decide.

A review of Ohio, other states, and federal cases leads to the conclusion that the decisions have been made on a case by case basis, and that there are no "hard and fast classifications in either the application of the principle [recognizing plain error] or the use of a descriptive title." 3 Wright, Federal Practice and Procedure, Section 856, at n. 86 (1969). Wright, supra, at page 373, suggests that the concept is one which "appellate courts find impossible to define, save that they know it when they see it."

As Wright points out, there appears to be a common purpose underlying the plain error rule in addition to protecting the defendant--that is, to protect both the integrity and the reputation of the judicial system. The motive is public, not private.

We conclude that plain error may be identified as obvious error prejudicial to a defendant, neither objected to nor

> affirmatively waived by him, which involves a matter of great public interest having substantial adverse impact on the integrity of and the public's confidence in judicial proceedings. The error must be obvious on the records, palpable, and fundamental, and in addition it must occur in exceptional circumstances where the appellate court acts in the public interest because the error affects "the fairness, integrity or public reputation of judicial proceedings." United States v. Atkinson (1936), 297 U.S. 157, at 160. The interest to be advanced is "the rule of law." This is a government of laws and not of men, even judges.

Recently in State v. Rahman (1986), 23 Ohio St. 3d 146, the Supreme Court found as error the prosecutor's comment in closing argument on appellant's post-arrest silence prior to trial. In essence, the prosecutor pointed out to the jury that appellant had not given his version of what happened until he testified at trial. The prosecutor used this post-arrest silence to attack appellant's credibility. The court noted this prosecutorial

comment was clearly improper citing Doyle v. Ohio (1976), 426 U.S. 610.

Nonetheless Chief Justice Celebrezze noted that appellant did not object at the time the prosecutor's comment was made. Thus, the court noted in the absence of plain error, the court need not consider this proposition of law. The court noted at page 153 of its opinion:

> In State v. Long (1978), 53 Ohio St. 2d 91 [7 O.O. 3d 238], paragraph three of the syllabus, we held that "[n]otice of plain error * * * is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." With this admonition in mind, we find that the single comment on appellant's post-arrest silence does not reach the serious constitutional impairment of the repeated references to such silence as were made by the prosecutor in Doyle, supra.
>
> While we cannot condone even an isolated reference to a defendant's post-arrest silence, we do not find plain error in the prosecutor's remark in this case sub judice. Thus, appellant's proposition of law is not well-taken. (Emphasis ours).

We are not required to find plain error unless the error was such to have caused a manifest miscarriage of justice. The single comment by the prosecutor bears little resemblance to the "machine gun" comments of the prosecutor in Chapman. Also, we cannot say from close examination of the record of this trial, that but for the error, (the prosecutor's comment) the outcome of the trial would clearly have been otherwise.

Finally, appellant contends the prosecutor made a totally improper appeal to the sympathies of the jury by urging the jury to convict him in order to avoid hurting Erin. The following is an excerpt from the record:

> [L]adies and gentlemen, the ultimate injury that could be inflicted upon this child is for you to come back with the wrong verdict, to come back and tell that little girl that we don't believe you. That would inflict the most serious injury on this child. (Tr. 1123).

Defense counsel did object to the prosecutor's remarks. Appeals to the sympathy of the jurors to the victim or defendant are clearly improper. Generally, however, statements made during a closing argument will not result in a reversal unless defendant's right to a fair trial was adversely affected. State v. Clark (1974), 40 Ohio App. 2d 365. In making this determination, the court considers several factors (1) the nature of the remarks, (2) whether an objection was made by counsel, (3) whether corrective instructions were given by the court and (4) the strength of the evidence against the defendant. See, State v. Hill (1977), 52 Ohio App. 2d 393.

The remarks were improper. Counsel in argument should confine its argument to the evidence presented and its legal implications. There was an appropriate

objection. The court did tell the jury in its final instructions that sympathy was to play no part in their verdict. (Tr. 1132). The evidence against the defendant was compelling.

Parenthetically it is notable that the prosecutor's appeal to the jury's sympathy for the child did not influence the jury in acquitting the appellant of the rape charges. We cannot say the accused was denied a fair trial as a result of the prosecutor's comments.

The second assignment of error is overruled.

In his third assignment, appellant contends that his due process rights were violated when the commencement of his prosecution was delayed for the purpose of prejudicing him. Appellant was indicted on January 16, 1985. The indictment alleges the offenses occurred between June 1, 1982 and September 1, 1983.

The record reveals that the appellant filed four separate pre-trial motions to dismiss or quash the indictment prior to his trial. In none of these pre-trial motions did appellant seek to quash the indictment because its commencement was purposely delayed.

Crim. R. 12(B) provides in part:

> (B) Pretrial motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before the trial by motion. The following must be raised before trial:
>
> (1) Defenses and objections based on defects in the institution of the prosecution.
>
> (C) Motion date. All pretrial motions except as provided in Rule 7(E) and Rule 16(F) shall be made within thirty-five days after assignment or seven days before trial, whichever is earlier. The court in the interest of justice may extend the time for making pretrial motions.
>
> (G) Effect of failure to raise defenses or objections. Failure by the defendant to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (C),

> or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for good cause shown may grant relief from the waiver. (Emphasis added).

In his brief, appellant contends that testimony at trial elicited from Diane Berezoski and Erin Rothwell established that "everything was known about the alleged offenses by December, 1983," yet prosecution was not initiated until January, 1985. (see brief at pages 27 and 28). Assuming the appellant did not learn this until the trial, the record fails to reflect that appellant moved to quash the indictment during trial. Appellant would have us consider error which he failed to bring to the attention of the trial court at any time. Generally, an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call

to the trial court's attention at a time when such error could have been avoided or corrected by the trial court. State v. Lancaster (1971), 25 Ohio St. 2d 83.

In a second part of his third assignment of error, appellant contends his constitutional rights under the Ohio and Federal Constitutions to be informed of the nature and cause of the accusations against him were violated when he was required to defend against an indictment which purported to charge seventeen different offenses all alleged to have been committed at unspecified times.

On January 17, 1985, appellant requested a bill of particulars pursuant to Crim. R. 7. The State responded by stating that the offenses occurred between June 1, 1982 and September 1, 1983 and specified the locations where the offenses occurred. The bill

failed to specify the dates when the offenses occurred other than the eighteen month period specified in the indictment. On March 11, 1985, appellant moved to dismiss the indictment because of the lack of specificity of the bill of particulars. The trial court overruled the motion to dismiss.

In State v. Sellards (1985), 17 Ohio St. 3d 169, the Supreme Court of Ohio held that in a criminal prosecution the state must, in response to a bill of particulars or demand for discovery, supply specific dates and times in regard to an alleged offense where it possesses such information.

In Sellards, id., the appellee was charged with three counts of rape and four counts of importuning. The charges involved several incidents between appellee and four boys. The indictment charged the appellee committed the offenses between certain dates (generally

over various one month periods in 1982). The appellant (sic) sought a bill of particulars, and the state responded by repeating the time frames of the alleged crimes stated in the indictment.

At trial three of the four victims testified to dates that were more specific than those stated in the bill of particulars. The defense moved for a mistrial. The prosecutor responded he only learned the more specific date the day before the trial. The motion was overruled. After the second witness also testified to a more specific date, the defense again moved for a mistrial. Again the motion for mistrial was overruled. After the defendant was convicted, the court of appeals reversed the conviction, finding the defendant had been denied due process and a fair trial. In reversing the court of appeals, Justice Douglas defined the issue before it.

The issue presented is whether the accused was denied his constitutional right of due process of law when he was compelled to stand trial on the basis of an indictment and bill of particulars which averred that the alleged offenses occurred during broadly specified intervals.

An individual accused of a felony is entitled to an indictment setting forth the "nature and cause of the accusation" pursuant to Section 10, Article I of the Ohio Constitution and the Sixth Amendment to the United States Constitution. The purpose of an indictment is twofold. By compeling the government to aver all material facts constituting the essential elements of an offense, an accused is afforded with adequate notice and an opportunity to defend. See Redmond v. State (1878), 35 Ohio St. 81, 82-83; Holt v. State (1923), 107 Ohio St. 307. An indictment, by identifying and defining the offense, also enables an accused to protect himself from any future prosecutions for the same offense. See Harris v. State (1932), 125 Ohio St. 257.

Pursuant to R.C. 2941.05, an indictment generally is sufficient if it contains, in substance, a statement that the accused has committed some public offense therein specified. See, also, R.C. 2945.83(A); Crim. R. 7(B). The General Assembly, in declaring what shall be sufficient in an indictment, provided, among other

things, that it shall be sufficient if it can be understood that the offense was committed at some time prior to the time of the filing of the indictment. R.C. 2941.03(E). It is also provided, in R.C. 2941.08, that "[a]n indictment or information is not made invalid, and the trial, judgment, or other proceedings stayed, arrested or affected: * * * (C) For stating the time imperfectly; * * *"

Case law is in accord. In Tesca v. State (1923), 108 Ohio St. 287, this court held in paragraph one of the syllabus that "[i]n a criminal charge the exact date and time are immaterial unless in the nature of the offense exactness of time is essential. It is sufficient to prove the alleged offense at or about the time charged."

Ordinarily, precise times and dates are not essential elements of offenses. Thus, the failure to provide dates and times in an indictment will not alone provide a basis for dismissal of the charges. A certain degree of inexactitude of averments, where they relate to matters other than elements of the offense, is not per se impermissible or necessarily fatal to a prosecution.

An accused is not foreclosed from securing specificity of detail, however, for R.C. 2941.07 provides that upon a request for a bill of particulars, " * * * the prosecuting attorney

shall furnish a bill of particulars setting up specifically the nature of the offense charged and the conduct of the defendant which is alleged to constitute the offense." A bill of particulars has a limited purpose-- to elucidate or particularize the conduct of the accused alleged to constitute the charged offense. See, e.g., State v. Halleck (1970), 24 Ohio App. 2d 74 [53 O.O. 2d 195]; State v. Dinsio (1964), 4 Ohio App. 2d 309 [33 O.O. 2d 353]. A bill of particulars is not designed to provide the accused with specifications of evidence or to serve as a substitute for discovery. State v. Wilson (1972), 29 Ohio St. 2d 203 [58 O.O. 2d 409]. Thus, " *** [o]rdinarily, specifications as to the date and time would not be required in a bill of particulars since such information does not describe particular conduct, but [instead describes] only when that conduct is alleged to have occurred, knowledge of which *** is generally irrelevant to the preparation of a defense." (Emphasis sic.) State v. Gingell (1982), 7 Ohio App. 3d 364, 367.

While temporal information is generally irrelevant in preparing a defense, this court agrees with the court in Gingell, supra, that the state must, in response to a bill of particulars or demand for discovery, supply specific dates and times with regard to an alleged offense where it possesses such information. As was stressed in Gingell at

368: " *** No door, however remote and uncertain, ought to be closed to an accused engaged in the task of preparing a defense to a criminal charge. Clearly it is wiser to err on the side of openness and disclosure."

The exercise of good faith on the part of the prosecution is essential in maintaining public trust and confidence in the integrity of our criminal justice system. Adherence to the above-stated rule will insure that no constitutional right of an accused to due process or a fair trial will be transgressed.

This court would hasten to add that inexactitude, even where the state is simply unable to comply with times and dates more specific than those found in the indictment, may also prove fatal to prosecution. Such would be the case if the absence of specifics truly prejudices the accused's ability to fairly defend himself. Two examples given by the Court in Gingell, supra, at 368, aptly illustrate this point:

"*** Suppose, in the instant case [involving rape], that the child Tracy had been twelve years old, verging on thirteen, instead of her actual eight years. Under such circumstances, specific dates of sexual conduct might well have become critical to the accused's ability to prepare a defense, since sexual conduct

toward one thirteen years of age or older would not constitute the offense of rape as defined in the charged section of the criminal code, R.C. 2907.02(A)(3). Or, suppose that the defendant had been imprisoned or was indisputably elsewhere during part but not all of the intervals of time set out in the indictment. Again, under such circumstances, the inability of the state to produce a greater degree of specificity would unquestionably prejudice the defenses."

On the other hand, where the ability to produce a specific time or date when the criminal conduct occurred is, as would be the more typical case, without material detriment to the preparation of a defense, the omission is without prejudice, and without constitutional consequence.

Applying these principles to the instant case, this court first notes that the indictment charged appellee with three acts of rape and four incidents of importuning, alleged to have occurred during delineated time periods at the accused's residence in Uhrichsville. The indictment was sufficient in that it charged conduct which, if proved, would constitute the offenses. R.C. 2941.05. Inasmuch as precise dates and times are not, in light of these facts, essential elements of the offense of rape and importuning charged herein, they are not essential to the

indictment. Similarly, the bill of particulars in this case conformed to statutory prescription. Accordingly, this court finds that the lack of preciseness as to date in the indictment and bill of particulars was not fatal to the state's case.

In addition, the record in this case does not indicate that the failure to provide the accused with a specific date was a material detriment to the preparation of his defense. In this regard, we note that while appellee claims on appeal that the inexactitude of the indictment and bill of particulars as to date denied him the ability to present an alibi defense, appellee never filed a notice of intent to reply on an alibi as is required by Crim. R. 12.1. (Cf. State v. Dingus [1970], 26 Ohio App. 2d 131,137 [55 O.O. 2d 280]; Gingell, supra, at 368.)

An examination of the transcript in this case, however, reveals that there is something growing out of the time intervals set forth in the indictment which potentially violated appellee's constitutional right to due process and a fair trial. The record indicates that while the prosecution learned the day before trial of a more precise date with respect to the alleged incident involving victim Kelly Weaver, this information was not disclosed to appellee. And, additionally, the time frames

involving two other incidents were similarly narrowed during the course of testimony at trial.

In State v. Gingell (1982), 7 Ohio App. 3d, the Court of Appeals for Hamilton County in a case with facts quite similar to the matter sub judice stated at page 368 of its opinion:

> The real problem arises in cases, like the present, where the state is simply unable to comply with times and dates more specific than those found in the instant indictment. With all the best will in the world, information more specific and particular about when the incident occurred cannot be secured. The circumstances is not by any means unusual: *** it may arise, as here, because the only witnesses to the event are of tender years, unsophisticated or unlearned in applying a calendar date to an observed or experienced event. Criminal acts are commonly hidden, surreptitious, disguised, and come ultimately to light adventitioiusly and incompletely revealed. Experience and common sense tells us that a certain degree of inexactitude of averments, where they relate to matters other than elements of the offense, is not per se impermissible or necessarily fatal to prosecution.

> Such unavoidable inexactitude may indeed prove fatal to a prosecution, but that depends, it seems to us, upon a determination of whether the absence of specifics truly prejudices the accused's ability fairly to defend himself.

For a similar holding see State v. Madden (1984), 15 Ohio App. 3d 130.

Erin Rothwell testified that she was born June 12, 1973, and thus the crimes as alleged in the indictment would have occurred when she was nine or ten years of age. Appellant was charged and convicted of 7 Counts of Gross Sexual Imposition in violation of R.C. 2907.059(A)(3); to wit that he had sexual contact with a person less than thirteen years of age. Since the offenses clearly were alleged to have occurred at least three years before Erin Rothwell reached her thirteenth birthday, the issue of the age of the victim at the time of the offense was not seriously at issue.

Unlike Sellards, supra, the evidence discloses that Erin Rothwell was unable to narrow the time of the offenses beyond the summer of 1982 and the early fall of 1983. ("summer after third grade and ended the summer before the fifth grade" See Tr. 65).

In State v. Mark White (April 17, 1986), Greene App. 85-CA-38, unreported, Judge Wolff wrote on behalf of this court:

> In almost any case involving the molestation of young children, the prosecution will have difficulty ascertaining the precise date of the offense. This will inevitably mean that the accused will be unable to provide an alibi defense unless he presents evidence of being elsewhere for the entire time period contained in the indictment. If that were sufficient to amount to "material detriment to the preparation of (the) defense" (See Sellards, 17 Ohio St. 3d at 172; Gingell, 7 Ohio App. 3d at 368), it would be nearly impossible to prosecute anyone for a violation of R.C. 2907.02(A)(3), or other similar offenses involving young children.

In Sellards, supra, Justice Douglas noted that the record did not indicate that the failure to provide the accused with a specific date ws a material detriment to the preparation of the defense, because appellee never filed a notice of intent to rely on an alibi as required by Crim R. 12.1. This reasoning is however circular as a defendant could hardly file his alibi notice without being given some particulars as to the time of the alleged offense.

While the time span of eighteen months as stated in this indictment is longer than the time frames approved in the previously cited cases, we fail to see any material difference between an indictment couched in this language and one with time spans of one month of six month periods. Alibis relate generally to specific short periods of time and the ability to defend an

indictment with offenses alleged to have been committed over a one month period is equally as difficult as defending this indictment.

Also Erin Rothwell testified that three of the gross sexual impositions occurred in appellant's home during the evening hours. At least as to these offenses, the likelihood of an alibi as to those offenses would appear remote. There is no evidence the State possessed any more particulars as to the date of the alleged offenses that the youthful victim could provide.

Accordingly, the third assignment of error is overruled.

In his fourth assignment of error, appellant contends the trial court improperly restricted appellant's right to challenge the State's case by cross-examination or by other means.

Diane Berezoski testified at length on direct examination. (Tr. 140-248).

She was exhaustively cross-examined. (Tr. 248-313). Appellant contends he was barred on cross-examination from making inquiry concerning prior inconsistent statements of Diane Berezoski (Tr. 290).

The defense in this case was that the defendant did not sexually abuse his stepdaughter. The defense contends that Erin Rothwell was untruthful, and that her charges against her stepfather were the fabrication of the appellant's vindicative and spiteful ex-wife, Diane Berezoski. Diane Berezoski testified she was responsible for making a complaint to the Sheriff's department concerning the abuse of her daughter by appellant. At issue in cross examination was the consistency of her trial testimony and her statement to Montgomery County Sheriff's officers, Burnham and Fox.

On cross-examination, Ms. Berezoski stated that in October 1983, her daughter Erin denied anything was occurring between herself and her stepfather. Ms. Berezoski was asked how long her daughter continued these denials. She responded:

> D. BEREZOSKI: A. Sir, I did not ask her again. I was not-- It wasn't until I had been in Dr. Harris' office that I felt something had happened.

Defense counsel then asked Ms. Berezoski if she remembered signing an affidavit and testifying under oath that Dr. Harris had never given her any information from Dr. Berezoski. (Tr. 280). She was then asked to read Defense Exhibit E, where she stated she had never had a conversation with Dr. Harris in the presence of Erin. She acknowledged further in the affidavit, that Dr. Harris never conveyed any information to her whether appellant had sexual contact with Erin Rothwell.

Ms. Berezoski acknowledged she had stated so in the affidavit dated April 12, 1985. She acknowledged the affidavit to be accurate. (Tr. 283).

She denied she told Officer Burnham that Dr. Harris told her about admissions made by appellant. She stated she told Burnham that appellant had told her he told Dr. Harris (about the sexual activity) and Dr. Harris was referring the matter to the Children's Services Board. (Tr. 283).

She was then asked if Burnham put in his police report that she told him that Dr. Harris informed her of appellant's admissions, whether Burnham would be lying. Ms. Berezoski replied that if Dr. Harris told Burnham something she couldn't know of it. (Tr. 284). She also denied she told Officer Fox that Dr. Harris informed her of admissions made by appellant. (Tr. 285). She stated if Officer Fox had

in his police report that Dr. Harris told her about appellant's activities, he would be in error or lying. (Tr. 285).

Counsel then asked Ms. Berezoski further at page 290 of the transcript:

> COUNSEL: Q. Why did you tell him that you learned this from Dr. Harris if that is not true.
>
> LANGER: Objection
> (A) If I told him that -
> COURT: The court would sustain the objection.
>
> COUNSEL: Q. Did you tell Detective Fox that you learned it from Dr. Harris?
>
> LANGER: Objection. This matter has been gone into before.
>
> COURT: The Court would sustain the objection.

Counsel then asked Ms. Berezoski further at page 290 of the transcript:

> COUNSEL: Q. Why did you tell him that you learned this from Dr. Harris if that is not true.
>
> LANGER: Objection
> A. If I told him that -

COURT: The court would sustain the objection.

COUNSEL: Q. Did you tell Detective Fox that you learned it from Dr. Harris?

LANGER: Objection. This matter has been gone into before.

COURT: The Court would sustain the objection.

Counsel was attempting to establish inconsistencies between prior statements by Ms. Berezoski and statements she may have made to law enforcement officers. She denied the statements to the sheriff's officers. Counsel wanted to pursue the matter again. The court properly sustained the objection as "asked and answered." Defense counsel was free to refute Ms. Berezoski testimony by presenting the sheriff's deputies which indeed he did by presenting officer Burnham as a defense witness. He did not produce Officer Fox. The trial court properly

sustained objection to repetitive inquiries on cross-examination. Appellant was not barred from cross-examining Ms. Berezoski about possible inconsistent statements made by her.

Appellant contends he was denied the opportunity to explore Diane's relationship with someone involved in the circumstances leading to appellant's prosecution. (Tr. 175, 251, 252). Appellant is referring to an individual who was a friend of appellant and Ms. Berezoski who loaned them some x-rated tapes. She was asked if the individual was a married man. She stated she picked up the tape from the individual's wife. (Tr. 251).

The prosecutor then asked to approach the bench and a discussion at the bench ensued:

> MR. LANGER: I presume you are going to ask whether or not she has had an affair with Tom Poulton?

MR. RION: That thought occurred to me.

MR. LANGER: I object. It simply has no relevancy in her sexual relationship with other persons other than the Defendant and the father of the previous husbands. I think that's not proper, a person's sexual....

MR. RION: What's the answer to the questions; what's her answer?

MR. LANGER: I'm not going to volunteer one way or another. If you don't know what the answer is, I am not.....

MR. RION: He told me that he would swear under oath that they did. I won't put the question to her.

THE COURT: You are kind. Thank you. (Tr. 251-252).

Apparently, the prosecutor was seeking an "in limine" ruling from the court, because he anticipated defense counsel would ask a question the nature of which would be prejudicial. Defense counsel did not inform the court that he desired to ask the question, only that "the thought occurred to me." Before the court could rule on the

objection of the prosecutor, defense counsel indicated he would not ask the question. Appellant can hardly object to a ruling which was not made by the court.

Appellant contends he was prevented from establishing that Diane had engaged in other conduct totally inconsistent with the truth of the charges she was making. (Tr. 263-68). Appellant does not enlighten us by this obscure reference to the transcript as to how the trial court erred. Diane testified that appellant indicated he needed additional child support from her former husband, Richard Rothwell, for the support of Amy and Erin Rothwell. She said appellant wanted $1000 a month or he would take nothing and adopt the children.

Ms. Berezoski stated she informed Richard Rothwell of appellant's request,

but that she never requested Rothwell permit appellant to adopt the children.

Ms. Berezoski stated she informed Richard Rothwell of appellant's request, but that she never requested Rothwell permit appellant adopt the children. (sic) Defense counsel then sought to ask Ms. Berezoski about the contents of a letter from Rothwell to her. (Defense Exhibit C for identification). The prosecutor objected to the contents of the letter and its authenticity on the basis that it was hearsay. (Tr. 266). The trial court sustained the objection. Defense counsel then asked her if indeed the letter in his hands wasn't the letter she received from her former husband. We believe the trial court properly ruled that the contents of the letter was rank hearsay.

Appellant contends that he was not permitted to cross-examine Diane

Berezoski concerning her motivation for making the charges against him. He refers us to Tr. 1034. Counsel asked Ms. Berezoski if it wasn't true that appellant told her that "this whole thing was trumped up and you were doing it out of hate?" The prosecutor objected that the matter had pursued (sic) during cross-examination when Ms. Berezoski testified in the State's case-in-chief, and that it was not proper rebuttal. The defense exhibit V was then played for the court. It contained excerpts from the phone conversations between appellant and Diane Berezoski in December 1984 and January 1985.

The State then withdrew its objection and defense counsel asked Ms. Berezoski if it wasn't true that appellant accused her of trumping up the charge out of hate. (Tr. 1042). The tape was then played to the jury. We can see no

merit in appellant's contention that he was limited in the cross-examination of his former wife.

Lastly, appellant contends that the trial court erred in excluding exhibits J through P - child abuse check lists, a psychological profile, and a credibility assessment of Erin Rothwell. While this argument bears no relation to the assignment, we find no error in the trial court's ruling. The exhibits were either articles written by other individuals or were notes made by the witness Marilyn Shea. These exhibits were no more admissible than offering in evidence textbooks written by other individuals. The notes of Marilyn Shea were merely a summary of why she believed Erin Rothwell did not fit the profile of sexually abused children. The jury had already heard extensive testimony from Dr. and Mrs. Shea on this matter. The

contents of the exhibits were contained in the oral testimony. The trial court properly excluded the exhibits. The fourth assignment of error is accordingly overruled.

In his fifth assignment of error, appellant contends the trial court erroneously admitted selected portions of taped conversations which had been surreptitiously recorded by appellant's ex-wife upon instruction of the prosecutor.

Diane Berezoski testified that she recorded telephone conversations between herself and the appellant between December 30, 1984 and January 7, 1985. Ms. Berezoski testfified she recorded the conversations at the request of the prosecutor Dennis Langer. Mr. Langer confirmed Ms. Berezoski's testimony. (Tr. 239). The taping of the conversations occurred prior

to the matter being submitted to the grand jury.

Prior to trial, appellant filed a motion in limine to exclude use by the state of the tapes on numerous grounds including that the evidence should be precluded under R.C. 2945.59. (See Motion dated May 9, 1985). Again on May 31, 1985, appellant renewed his objections to the use of the taped conversations. Appellant particularly objected to references on the tape to "an incident in 1981" which concerned conduct outside the period alleged in the indictment.

A hearing on the tapes admissibility was conducted on August 5, 1985. Because the taped conversations covered nearly four hours and included objectionable matter, the prosecution presented as State's Exhibit 4, a notice of intent to use certain segments of the taped conversation. The State also introduced

State's Exhibit 5 which was a transcript of all the taped conversations so that the court could decide whether the excerpted tape conversation, State's Exhibit 4, had been taken out of context. The defense again objected to any reference to events occurring in 1981. (Pre-trial hearing Tr. 44-48). The trial court overruled the objection to the tapes based on the prosecutor's representation that "we are talking about the same period of time in the indictment and the conversation, even though the recorded coversations refer to '81, that is tied together. (Pre-trial Tr. 68).

Prior to Diane Berezoski testifying at trial, defense renewed its objections to the tapes being submitted as evidence and asked the court to accept a continuing objection to their use. (Tr. 139). During the testimony of Diane Berezoski, the State introduced

State's Exhibit 9 an excerpt of conversations of appellant and Diane Berezoski between December 30, 1984 and January 7, 1985 (Tr. 246). In pertinent part the following is a portion of that tape:

> BOB: How does something other than therapy, how does that help.
>
> DIANE: Therapy, you've never entered into her therapy. All you say is OK, yes I molested her, but it stopped in 1981, now what good does that do to Erin.
>
> BOB: But I have entered into her therapy. I've treated myself. I have never stopped going to Dr. Bensonhauver.
>
> DIANE: You have treated yourself by helping her. You have stood on my front porch and called me a liar because of what she says.
>
> BOB: But at least what I am hearing is not what happened. It is not Diane. She is saying she had vaginal and oral intercourse and that didn't happen.
>
> DIANE: Yes, she is saying that.
>
> BOB: But, Diane, in the way that you and I know that those acts are performed, that did not happen.

DIANE: In the way that I know they're performed. They're only performed one way.

BOB: That's right. It's also a physical impossibility.

DIANE: It isn't a physical impossibility to have intercourse with a nine year old child.

BOB: Diane, this didn't happen when she was nine. This happened in 1981. This happened and the last time before anything occurred. And you should ask her about this. It was before she went to see Rick and she and I on two or three ocassions went outside and walked around the circle and we talked about this. We talked about how relations like this were used between people who were in love, between husband and wife, and that this was an abnormal functioning and that this was an experimentation on her part and it was wrong on my part and we talked about it and she and I had as close a conversation and understanding about this as possible and it never happened again after that. And it didn't Diane.

* * *

BOB: No, no. I turned around. The problems that happened with me, the psychological problems that happened with me were exactly as Harris said: "This person cannot tell you that you're inadequate. This person can't tell you that you're not an

> adequate person because she doesn't know what adequate is. And that's the psychological problem underlying all of this. Now those things have been brought out on my side. Those things have been dealt with. There's never been a moment of abnormal behavior in almost four years now. And there just just (sic) hasn't been. (Emphasis ours).

Appellant contends the admission of ambiguous statements uttered by the defendant concerning acts other than those charged in the indictment violate Evid. R. 404(B) which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In State v. Thompson (1981), 66 Ohio St. 2d 496, in a 4-3 per curiam decision the Ohio Supreme Court reversed the conviction of the defendant because evidence of a subsequent criminal act was admitted wholly independent of

the criminal offense for which the defendant was on trial. The defendant was indicted for a violation of R.C. 2907.05(A)(3) in that "from June 1, 1977 through September 30, 1977, he had sexual contact with a person, not his spouse, less than 13 years of age. The victim was his daughter whose 13th birthday occurred on October 10, 1977.

The daughter testified that on an unspecified date in the summer of 1977 defendant touched her breasts and pubic region. The prosecutor elicited, over objection, testimony concerning incidents occurring subsequent to the summer months of 1977 of the defendant having sexual contact with his daughter. She testified that defendant fondled her approximately three weeks after her 13th birthday, and that in total, appellee engaged in similar conduct on about 15 occasions in 1977, 1978, and 1979.

The court rejected the State's theory that this latter evidence was admissible under "other acts" testimony under R.C. 2945.59 to show motive, intent, absence of mistake or accident, scheme, plan or system in doing the act. The court noted such evidence is never admissible when its sole purpose is to establish the defendant committed the act alleged of him in the indictment. Citing, State v. Flonnory (1972), 31 Ohio St. 2d 124 and State v. Lytle (1976), 48 Ohio St. 2d 391.

The Supreme Court further noted at pages 498 and 499 of its opinion:

> "Other acts" testimony is relevant and, thus, admissible, under the scheme, plan or system" exception of R.C. 2945.59 where those acts form part of the immediate background of the crime charged, and hence are "inextricably related" to the act alleged in the indictment; that is, where the challenged evidence plays an integral part in explaining the sequence of events and is necessary to give a complete picture of the alleged crime. State v. Wilkinson, supra;

State v. Lyetle, (sic) supra; State v. Curry, supra. "The jury is entitled to know the "setting" of a case'". State v. Wilkinson, supra, at page 317.

According to Brenda's testimony, appellee's subsequent acts occurred, at the earliest, ten days after the time alleged in the indictment. Some of the subsequent acts occurred nearly two years later. Here, as in State v. Eubank (1979), 60 Ohio St. 2d 183, the acts testified to were "chronologically and factually separate occurrences" (supra, at 186). They are not "inextricably related" to the acts alleged in the indictment.

Identity was not an issue at trial. Indeed, the only factual issue contested at trial was the timing of appellee's first sexual contact with his daughter, i.e., whether it occurred prior to Brenda becoming 13 years of age. Appellee's subsequent acts are not relevant to a determination of when the first such act occurred.

The sole purpose of the subsequent act evidence in this case was to convince the jury that the appellee was deserving of punishment, and that it was likely he had sexual contact with Brenda prior to her 13th birthday because he engaged in similar conduct thereafter. As such, the testimony did not fall into the "scheme, plan, or system" exception of

R.C. 2945.59 and was not properly allowed.

Because we find that subsequent acts testimony was impermissibly allowed, it is unnecessary to decide whether the trial court's instructions to the jury complied with the requirements of State v. Flonnory, supra.

The state contends that the allowance of such testimony was harmless error beyond a reasonable doubt. Chapman v. California (1967), 386 U.S. 18. Unlike State v. Eubank, supra, this cause was tried to a jury and not a judge. The subsequent acts testimony was highly inflammatory in nature. Upon a complete review of the record we conclude that there is a reasonable possibility that this testimony contributed to the accused's conviction, hence the error in admitting it cannot be considered harmless. State v. Lytle, supra.

The time at which defendant had improper sexual contact with his daughter was a critical issue in this case. Defendant could be convicted of gross sexual imposition only if daughter was less than 13 years of age at the time of the occurrence. If his daughter was over 13 at the time, defendant's conduct would constitute the lesser offense of sexual imposition in violation of R.C. 2907.06. There remains the real possibility that defendant was convicted of gross sexual

imposition because of the improper admission of testimony that he committed sexual imposition herein subsequent to his daughter becoming 13 years of age. Being convicted of a higher degree of the crime (a felony rather than a misdemeanor) under such circumstances constitutes prejudice even though such prejudicial testimony might establish commission of the lesser degree of the crime.

In footnote 4, the Supreme Court noted the following:

In order that the nature of the record not be misunderstood, the following additional comments are appropriate. (1) Brenda's testimony on direct examination concerning incidents occurring during the period charged in the indictment (before her 13th birthday) consumes less than one full page of the trial transcript. Of the remainder of her direct examination, 12 out of 17 pages of transcript concern contacts occurring subsequent to her birthday and was erroneously admitted. On cross-examination defense counsel obtained an admission from Brenda that she "had trouble remembering dates." Similarly, defense counsel confronted Brenda with a statment (sic) made in June 1978, in which Brenda stated that "seven months ago [i.e. December 1977] it all started." This court, as a reviewing body, does not weigh the credibility of witnesses.

> (2) The defendant made a voluntary statement on August 9, 1979, in which he admitted that "on several times I did make physical contact with Brenda." No inference can be drawn from the statement that such incidents occurred prior to October 13, 1977. (3) Sgt. Dennis Woods of the Newark Police Department, the prosecution's sole remaining witness, testified that he arrested Thompson on August 9, 1979, following issuance of the indictment, and took his statement after advising him of his rights. Sgt. Woods further testified that specific dates of such conduct were not discussed, only that Thompson admitted that his conduct with Brenda had been going on for some time and had gone on prior to 1979. His testimony was in no way probative of the state's contention that defendant's abhorrent conduct occurred as early as June, July, August or September of 1977, the only time period relevant to this prosecution.

In a vigorous dissent, Chief Justice Celebrezze agreed that the evidence of the subsequent sexual acts of the defendant should not have been admitted pursuant to R.C. 2945.59. However, he noted that the admissible testimony of the victim was uncontroverted.

He also pointed out the defendant confessed to having engaged in sexual contact with the victim. The Chief Justice submitted that there was no reasonable possibility that the improperly admitted "other acts" testimony contributed to Thompson's conviction. Justice Locker and Holmes concurred in the dissent.

Unlike Thompson, the admissions of the defendant that he engaged in some sort of abnormal behavior with his daughter Erin in 1981 was not admitted proof of a more serious crime. If indeed sexual contact was made by defendant with his daughter in 1981 the crime would remain gross sexual imposition as the other acts of sexual contact in 1982 and 1983. The critical question was whether the admission of the tapes referring to criminal acts in 1981 was harmless error?

Diane Berezoski testified that the appellant told her that he had informed Dr. Gordon Harris that he (appellant) had molested Erin and it would be reported to Children's Services. (Tr. 199).

Albino (sic) Pino, intake supervisor for Children's Services, testified he received a report from Dr. Harris on December 16, 1983, that appellant had sexually abused his stepdaughter. Pino noted that Harris informed him that the abuse was manual contact "such as fondling and touching." Pino noted on the referral report (State's Exhibit 13) that "according to Bob, nothing has happened recently." "No sexual contact for nine months to a year, Bob says." (Emphasis ours).

In light of the appellant's admissions to his former wife and to Dr. Gordon Harris that he had abused his child, and that this abuse occurred during

the time period alleged in the indictment, we fail to see how the references to sexual activity in 1981 could have affected the outcome of these proceedings. Appellant himself admits he engaged in external touching of his stepdaughter for which he harbors extreme feelings of guilt. (State's Exhibit 9, 19, and 21). The references on State's Exhibits 9 to 1981 is at best harmless.

Appellant contends the trial court erred in admitting the taped telephone conversation between appellant and his former wife in violation of appellant's Sixth Amendment right to counsel since the prosecutor instructed that the former wife record the conversations, for use in a scheduled grand jury hearing.

Dennis Langer, assistant county prosecutor, testified in an in camera hearing, that he instructed Diane

Berezoski in December 1984 to tape record any phone conversations she would have with the appellant. (Tr. 238, 239). This instruction occurred after the initial police report was filed in this matter and after the matter had been scheduled for presentation to the grand jury. Langer stated he merely instructed Ms. Berezoski to turn on the tape recorder when appellant called her. He stated he did not prompt her to ask any specific questions of the appellant.

Counsel for the defendant objected to the admission of the tapes because appellant was not advised of his Miranda rights and no warrant was issued for the surreptious eavesdropping. (Tr. 242). No mention was made of a specific Sixth Amendment violation except in the context of Miranda. The trial court overruled the motion of the

defendant to deny admission of the tapes.

Appellant contends that he was represented by counsel at the time the telephone conversations with his wife occurred, the prosecutor knew that, the conversations were recorded at the prosecutor's direction, and the matter was scheduled for grand jury prior to the recordings. Appellant argues that since the action against the appellant had become accusatory, and the conversations were recorded at a critical stage of the prosecution, appellant was denied assistance of counsel during the recordings.

The State argues that the appellant has waived his right to appeal this issue because appellant never raised the specific objection of the Sixth Amendment violation to afford the trial court the opportunity to rule upon

it. Citing, State v. Lancaster (1971), 25 Ohio St. 2d 83.

While counsel raised a general Sixth Amendment objection to the admission of the tapes on Miranda grounds, he failed to assert the specific objection he now raises.

There is no evidence in the record that the State knew that appellant had secured counsel, other than counsel representing appellant in his divorce action. In a case with facts strikingly similar to those sub judice, the United States Court of Appeals for the Seventh Circuit found no Sixth Amendment violation in government directed tape recordings with the suspect before presentation of the case before the grand jury. In United States v. Craig (1977), 573 F. 2d 455, the court noted:

> Nor does it make a difference that the government knew prior to the recordings that Walker was represented by counsel. The violation of the Sixth

Amendment right to counsel as claimed here is to be viewed in the context of whether the claimed violation occurred in a critical stage of a prosecution, and not in the context of whether defendant had retained counsel in face of a governmental investigation. (Citation omitted) (Emphasis in original).

The Court went on to note at page 475 of its opinion:

Nevertheless, Walker argues that at the time of the recorded conversations the government was no longer simply investigating him. Walker asserts that because Carpentier would testify that he had bribed Walker and because other witnesses would provide evidence needed to establish other elements of the scheme, his indictment "was then as certain as the sun setting in the West and that it was being deferred merely to permit the government to beef up its case with admissions to be obtained by stealth and trickery." Walker concludes by stating that "the indictment was being withheld, perhaps with the conscious purpose of avoiding any right to counsel problems."

The record does not support Walker's contentions. Nothing therein indicates that the government withheld the indictment for any purpose whatsoever. Furthermore, in an investigation into a complex scheme involving as many persons, occurring in

> as many places, and carried on as long as the scheme established by the government in this case, we are compelled to reject Walker's unadorned contention that his formal charge was withheld for the purposes asserted here. In any event, the government is certainly not required to cease an on-going investigation into a far-reaching scheme such as this when it appears to have probable cause to seek an indictment as to one individual. Cf. Hoffa v. United States, supra; United States v. Gardner, supra; United States v. Skelley, 501 F. 2d 447 (7th Cir. 1974), cert. denied, 419 U.S. 1051, 95 S.Ct. 629, 42 L.Ed.2d 647 (1974). (sic)

In short, we find no violation of the appellant's Sixth Amendment rights in the admission of the tape recordings.

In the third subsection of this assignment appellant contends the trial court erred in allowing the prosecutor to excerpt portions of many hours of tape recorded conversations in a manner which distorted the meaning of recorded conversations and to deny appellant a fair trial. Appellant contends that the prosecutor went beyond the scope

of the legitimate comment on the evidence when he asserted that appellant had admitted fondling Erin Rothwell in his tape conversations with Diane Berezoski.

A trial court is granted considerable discretion in determining the admission of evidence at trial. Unless the court has abused that discretion and the defendant has been materially prejudiced thereby, the trial court's decision should stand. State v. Hymore (1967), 9 Ohio St. 2d 122. Both parties admit the excerpted portions of the tape recordings were but a small portion of the entire tape recordings. Both parties admit the tape contained considerable collateral and irrelevant material in the approximately four hours of tape recordings. Appellant was free to play for the jury any additional portions of the tapes he believed may have explained or placed

in context the excerpted portions of the tape. We see no abuse of discretion in the admission of the excerpted tapes.

Appellant also contends the prosecutor unfairly commented on the tapes in his argument. No objection was made to such comment by the defense. The prosecutor is free to argue all reasonable inferences from the tape recorded conversations. The court instructed the jury that argument was not evidence and they were the sole judge of the facts presented to them. The appellant's argument is without merit.

Lastly, appellant contends that even if the tapes were admissible, the admission of the tapes by the trial court was error because they should have excluded (sic) pursuant to Evid. R. 403(A). That rule provides that relevant is not admissible if the probative value is substantially

outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

In Exhibit 9, appellant denied that he had intercourse or engaged in oral sex with Erin. Appellant however admitted external touching of his stepdaughter. Appellant stated "What happened was pressing against oneself... They are just as bad in my mind as if an erected penis was shoved into someone's vagina." State's Exhibit 4 pretrial). "What happened was external, it was not vaginal penetration." (State's Exhibit 19) pretrial). "What happened was external. What happened was pressing against oneself. Those are the things that happened. Those are just as bad in my mind as if an erected penis was shoved into someone's vagina. That didn't occur, it never occurred." (State's Exhibit 21).

On cross-examination of Diane Berezoski, counsel used excerpts of the tape conversations to place numerous exculpatory remarks or denials of the appellant before the jury. (See Def. Exhibit V).

We find no abuse of discretion in the court's admission of the tape conversations. The appellant's fifth assignment of error is overruled.

Appellant in his sixth assignment of error contends the trial court erred in failing to record critical portions of the trial in violation of Crim. R. 22 and of his right to effective appellate review.

Appellant points out that tape recordings of conversations between himself and Diane Berezoski were played during the State's case-in-chief. (Brief reference to record at 236). Appellant's reference to the record is inaccurate. At page 246 of the

record State's Exhibit 9, a tape was played to the court and jury but was not taken down in stenotype. No objection was made by the defense and the tape recording was not transcribed by the reporter. The exhibit was admitted and has been reviewed by this court. A transcription of State's Exhibit 9 was provided to the defense at a motion in limine hearing conducted on August 5, 1985 and marked as State's Exhibit 4. (See Transcript of pre-trial hearings at page 43).

Appellant also contends that other tapes were played extensively during the prosecutor's cross-examination of defense experts. Appellant refers us to the record at pages 770-771). (sic) An examination of the record indicates the prosecutor questioned Dr. Marilyn Shea on cross-examination with references to excerpts of her taped interview with Erin Rothwell.

The excerpts were contained in State's Exhibit 15 and was admitted and preserved as part of the appellate record. The tape was played for the benefit of Dr. Shea, the court and jury but was not taken down in stenotype. Again, no objection was made by defense counsel to this procedure.

Appellant argues that more tapes were played during rebuttal. Appellant refers us to the record at page 1051 and during a conference in chambers at pages 1036-41. The prosecutor asked Diane Berezoski about two more statements made by the appellant during her phone conversations with him. She was asked if State's Exhibit 21 was a fair record of tha (sic) portion of the conversation. (Tr. 1051). Again no objection was lodged by defense counsel to the failure of the court reporter to transcribe this tape admitted as an exhibit.

After Diane Berezoski testified on rebuttal, the defense introduced Defense Exhibit V which was a tape of conversations between appellant and Mrs. Berezoski. The State objected that the tape was not proper cross-examination. (Tr. 1032). The tape was played for the court in an in camera hearing. It was not transcribed. Again no objection to the procedure was made. (Tr. 1038, 1040). The State withdrew its objection and the tape, Defense Exhibit V, was played for the jury as well. It was not transcribed by the court reporter without objection. (Tr. 1043).

Crim. R. 22 states that "in serious offense cases all proceedings shall be recorded." Proceedings may be recorded in shorthand, or stenotype, or by any other adequate mechanical, electronic or video recording device.

Appellant argues that Crim. R. 22 sets forth a rule of practice which has long been established by R.C. 2301.20 which is:

> The purpose of the statute [R.C. Sec. 2301] is to provide a method by which errors may be preserved so that on appeal a proper determination and review may be made by appellate courts to the end that the rights of appellants may be protected in the manner provided by the Constitution and laws of this State.

State v. Mishne, 93 Ohio L. Abs. 85, 197 N.E. 2d 224, 229 (Geauga Cty. 1963).

Appellant argues that the failure of the court reporter to record portions of the tapes that were played at critical points during the trial operated to deny the appellant the right to full and effective appellate review. Appellant argues the propriety of the prosecutor's cross-examination of Dr. Marilyn Shea since the record does not reflect precisely what the prosecutor asked, or to assess the validity of

defense counsel's objection to the use of the recordings (Tr. 697), or to appraise counsel's request that the entire 9 1/2 hours of recordings be admitted.

The record does reflect precisely what the prosecutor asked before the tapes were played. The tapes are in evidence for us to review so the entire question of the prosecutor is reviewable. At page 697 of the record defense counsel objected to playing the tapes in front of the jury before the judge ruled on their admissibility. The tapes are preserved for our review and the propriety of the trial court's ruling. The 9 1/2 hours of tapes are preserved as State's Exhibit 5 (pre-trial exhibit). The tapes are transcribed by a court reporter.

It is also notable that not once did the defense counsel object to the procedure employed, though it occurred

on a number of occasions. Any error in failing to transcribe the tapes has been waived by defendant's failure to file a timely objection. State v. Lancaster (1971), 25 Ohio St. 2d 83. Appellant does not argue because of the court reporter's failure to transcribe the tapes. Indeed, counsel cites at length the tapes in a verbatim manner to this court. The pretrial exhibit contains verbatim transcription of the telephone conversation between Diane Berezoski and the appellant. The exhibits were available for transcription for purposes of preparation of the appellate brief.

Parathetically, (sic) we have carefully examined and listened to all tapes admitted as exhibits and related them to all testimony given at the trial. Crim. R. 22 permits the record to be provided by electronic device, e.g. tape recording. The

appellant has failed to demonstrate any prejudice to him by the procedure employed by the trial court. The sixth assignment of error is overruled.

In his seventh assignment of error, appellant contends the trial court denied appellant due process of law by relieving the state of the burden of establishing proof beyond a reasonable doubt.

Appellant contends that the court's final instructions to the jury taken as a whole relieve the state of its burden of establishing guilt beyond a reasonable doubt.

The trial court began its charge to the jury:

> "The Defendant is presumed guilty (sic) until his guilt is established beyond a reasonable doubt. The Defendant must be acquitted unless the State produces evidence which convinces you beyond a reasonable doubt...
>
> MR. RION: Excuse me....

THE COURT: (Continued) Beyond a reasonable doubt of every essential element of the crimes charged in the indictment." (Tr. 1125) (Emphasis added).

After the charge to the jury was completed counsel for appellant informed the judge of his mistake in the charge. The trial judge then corrected his charge:

"THE COURT: Counsel very properly pointed out, and I didn't pick it up when I did it or I certainly wouldn't have done it, I suspect one of the problems is you get used to these things and you don't really pay attention to what it says. It is a reminder of what you do next.

The Court, pretty well toward the beginning of the charge, should have said the Defendant is presumed innocent until his guilt is established beyond a reasonable doubt. That is the law and there's no question about it, and start out with that proposition when you consider these cases and then go ahead to apply the rest of the instructions.

Is that adequate?

MR. LANGER: Yes.

MR. RION: Yes."
Tr. 1138-1139.

The record demonstrates that appellant's counsel was satisfied with the trial judge's correction of his "slip of the tongue." The instruction as a whole clearly placed the burden of proof upon the State to prove guilt beyond a reasonable doubt. See, e.g. State v. Rappold & Espensen (Sept. 28, 1983) Mont. App. No. 8253 unreported.

Appellant also contends the court's final instructions were faulty because the trial court did not inform the jury of the meaning of presumption of innocence as required by R.C. 2938.08. The record fails to disclose any objection to the court's charge on presumption of innocence other than the one previously noted as to the court's "slip of the tongue." A party may not assign as error the giving or the failure to give any instruction unless he objects thereto before the

jury retires to consider its verdict stating with specificity the matter to which he objects. Crim. R. 30. See also State v. Nabozny (1978), 54 Ohio St. 2d 195.

In Taylor v. Kentucky (1978), 438 U.S., 478, the Supreme Court held that on the facts before it, the trial court's refusal to give petitioner's requested instruction on the presumption of innocence resulted in a violation of his right to a fair trial. As guaranteed by the Due Process Clause of the Fourteenth Amendment. Unlike Taylor, the trial court did instruct on presumption of innocence. The court also instructed the jury that whether or not the state had proven its case must be determined from the evidence (testimony and exhibits admitted at trial). See Tr. 1126.

Appellant also complains that instructions given by the trial court

relieved the state of the burden of proving guilt beyond a reasonable doubt. The trial court gave the statutory definition of beyond a reasonable doubt as found in R.C. 2901.05(D). The appellant did not object to the instruction as given as required by Crim R. 30. His objection now in this court is not timely. Parenthetically, this part of appellant's assignment is without merit.

In State v. Nabozny, supra, the Ohio Supreme Court held at paragraph of the syllabi:

> The definition of "reasonable doubt" set forth in R.C. 2901.05 correctly conveys the concept of reasonable doubt and, therefore, is not an unconstitutional dilution of the state's requirement to prove guilt beyond a reasonable doubt.

See also, State v. Maurer (1984), 15 Ohio St. 3d 239 and Thomas v. Arn (6th Cir. 1983), 704 F. 2d 865.

In the third portion of this assignment, appellant contends that the trial court erroneously failed to charge the jury "on the manner in which a child's testimony was to be weighed." (See appellant's brief at p. 58).

Defense counsel requested the trial court give the following instruction:

> The Testimony of children under ten (10) years of age is not always admissible in Court's of law because of their inability to appreciate their oath and the serious nature of their testimony.
>
> Some to what Erin Rothwell has testified to is alleged to have occurred to her when she was under the age of ten (10). You should treat her testimony with great caution and attempt to determine if at that age she was capable of receiving just impressions and able to accurately relate same.
>
> Likewise you should consider her testimony in light of her age, impressionability and possible influences, if any, exerted upon her by anyone. (Tr. 1005).

The prosecutor objected to the requested instruction citing Evid. R. 601(A). The trial court denied the requested instruction stating that since Erin Rothwell was over ten years of age when she testified, she was presumed competent, and her testimony left little doubt about her ability to observe and relate. The court then stated he would give the general charge as to the credibility of witnesses. (Tr. 1006).

The State argues that the record failed to demonstrate that counsel for defendant objected to the trial court's failure to give his requested jury instruction and thus he cannot raise any such error before this court. The State cites Crim. R. 30 for its contention. In State v. Slone (1975), 45 Ohio App. 2d 24, the Court of Appeals for Franklin County held a criminal defendant whose request for jury

instructions fails to embody the correct law governing the matter involved, and who otherwise fails to comply with Crim. R. 30, by not formally objecting, waives his right to question the trial court's charge upon appeal. The Court of Appeals noted at page 29 of its opinion:

> We hold that the purpose of Criminal Rule 30 is the same as its counterpart in civil practice, Civ. R. 51(A). Such purpose or theory was set forth in the case of Presley v. Norwood (1973), 36 Ohio St. 2d 29, 33, wherein the court quoted McCormac, Ohio Civil Rules Practice, Section *2.18: "*** [T]he court should be given an opportunity to correct a mistake or defect in the instruction when it can be accomplished during the same trial."
>
> The court, in Presley v. Norwood, went on to hold the following within the first paragraph of the syllabus:
>
> "Where the record affirmatively shows that a trial court has been fully apprised of the correct law governing a material issue in dispute, and that the complaining party has unsuccessfully requested the inclusion of that law in the

> trial court's charge to the jury, such party does not waive his objections to the court's charge by failing to formally object thereto. (Civ. R. 51 (A).)"
>
> We hold that such reasoning is equally applicable to the trial of criminal matters, and if the record affirmatively shows that a trial court has been fully apprised of the correct law governing the criminal matter involved, and that the defendant has unsuccessfully requested the inclusion of that law in the trial court's charge to the jury, the defendant cannot be said to have waived his objections to the court's charge by failing to formally object after the charge is given. (Emphasis ours).

The issue before us therefore is whether defense counsel apprised the trial court of the correct law in his requested instruction. Evid. R. 601 establishes that every person is competent to be a witness in a civil or criminal case. One exception are children under 10 who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them

truly. See Evid. R. 601(A); R.C. 2317.01.

It is well settled that the competency of witnesses is a question for the trial court. Evid. R. 104(A); Kornreich v. Industrial Fire Ins. Co. (1936), 132 Ohio St. 78. A child ten years old or older is prima facie competent. R.C. 2317.01.

Where a witness is over ten at the time of the testimony but under ten at the time of the happening, the capability of the witness to receive "just impressions" of such happening must be determined as of the time of the happening. Huprich v. Paul W. Varga & Sons Inc. (1965), 3 Ohio St. 2d 87. If the examination of the child fairly discloses that he is capable of receiving just impressions of the facts and transactions respecting which he proposes to testify, and of relating them truly, and if he appears to

understand the nature of the oath and the penalties for its violation, he is a competent witness. Barnett v. State (1922), 104 Ohio St. 298; State v. Lee (1983), 9 Ohio App. 3d 282.

Because of the more advantageous position of the trial judge to observe the child's conduct and intelligence, his decision will not be disturbed by a reviewing court, unless it clearly appears from the record that he abused his discretion or misunderstood the law. State v. Holt (1969), 17 Ohio St. 3d 81.

A determination that a child witness is competent does not establish the child's credibility, which remains for evaluation by the trier of fact. Darcy v. Bender (1980), 68 Ohio App. 2d 190.

Immediately before opening statement by the prosecution, defense counsel objected to the testimony of Erin

Rothwell because "that which she is reporting occurred prior to her being ten years old, and we feel under Rule 601 of the Rules of Evidence that she is incompetent as a witness." (See Tr. 20). The court overruled counsel's objection, and indicated that the competency questions was to be determined as of the time she testified, and not as to the time of the event for which the child testifies. (See Tr. 20).

The trial court quite properly overruled the defense counsel's objection as Erin Rothwell was not rendered an incompetent witness merely because she was under ten years of age at the time of the alleged sexual assaults to which she would testify. If Erin Rothwell was capable of receiving just impressions of the facts or transactions of which she proposed to testify, and of her obligation to relate them in a truthful manner, she was competent

to testify. This necessarily required an assessment of her competency at the time of the alleged crimes and when she took the stand at trial. See Huprich v. Paul W. Varga & Sons Inc., supra.

Erin Rothwell testified she was age twelve. She stated she was in the seventh grade. She related in some detail her family and school history. She stated she understood her obligation to testify truthfully. (Tr. 64). She stated the sexual assaults allegedly perpetrated by her stepfather occurred between the summer of the third grade and ended the summer before her fifth grade. The record fails to disclose that defense counsel sought to have the trial court voir dire Erin Rothwell as to her competency outside the hearing of the jury. Erin was extensively examined both on direct and cross-examination. (See Tr. 42-135).

After Erin testified there was no objection by defense counsel that her testimony revealed any lack of competency on the child's part. Indeed, the court, in refusing the requested instruction, noted that after testimony to Erin "there was not much question about her ability to observe and relate." (Tr. 1006).

The instruction which defense counsel requested to be given by the court attempted to place the issue of competency in the hands of the jury, to-wit: "that they should determine whether Erin was capable of receiving just impress was (sic) and was able to accurately relate same." (Tr. 1005). The issue of competency was for the court to decide, the issue of credibility for the jury to determine. See Darcy v. Bender supra.

Counsel also sought to have the jury instructed to consider Erin's

testimony with "great caution", and to consider her age, impressionability and possible influences, if any, exerted upon her by anyone.

In State v. Workman (1984), 14 Ohio App. 3d 385, the Cuyohoga County Court of Appeals held it was not error to refuse to give a special instruction on the credibility of child witnesses. The court noted that the trial court, in the proper exercise of its discretion, had determined the children were competent to testify. The court noted the jury instructions explicitly stated that the jurors were the sole judges of the credibility of the witnesses. See also, State v. Danny Brown (Sept. 16, 1983), Lucas App. L-82-297 unreported.

The trial court thoroughly and properly instructed the jury with respect to the credibility of witnesses and the weight the jury might attach to

such testimony. The court did not err in giving the requested instruction. Appellant's seventh assignment of error is overruled.

In his eighth assignment of error appellant contends he was sentenced in violation of R.C. 2945.75(A)(2).

Appellant was charged by indictment and convicted of seven (7) separate counts of Gross Sexual Imposition (against a person under 13 years of age) in violation of R.C. 2907.05 which provides in pertinent part as follows:

> (A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons, to have sexual contact when any of the following apply:
>
> (3) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of such person.
>
> (B) Whoever violates this section is guilty of gross sexual imposition. Violation of division

(A)(1) or (2) of this section is a felony of the fourth degree. Violation of division (A)(3) of this section is a felony of the third degree.

R.C. 2945.75 provides in pertinent part:

(A) When the presence of one or more additional elements makes an offense one of more serious degree:

(1) The affidavit, complaint, indictment, or information either shall state the degree of the offense which the accused is alleged to have committed, or shall allege such additional element or elements. Otherwise such affidavit, complaint, indictment, or information is effective to charge only the least degree of the offense.

(2) A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.

Appellant argues that since the jury's guilty verdicts did not specifically state either that he was found guilty of a third degree felony

or that the victim of the offense was under thirteen years of age, then he was not convicted of a third degree felony but rather that of a fourth degree felony. The jury found the defendant guilty of gross sexual imposition "as charged in the indictment." (Counts 11 throuth 17) (Emphasis ours).

The state argues that since the records fails to disclose that appellant objected to the form of the verdicts, any error in that particular regard has now been clearly waived by his failure to register a timely objection. The state contends the appellant failed to afford the trial court an opportunity to correct the problem of which he complains. The state cites State v. Lancaster (1971), 25 Ohio St. 3d 83 in support of its argument.

In State v. Lancaster, id, the Supreme Court stated an appellate court will

not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court. (Emphasis ours).

In State v. Corkran (1965), 3 Ohio St. 2d 125, the Supreme Court held at syllabus 2:

> Where an indictment, framed under Section 2907.30, Revised Code, charges defendant with knowingly receiving and concealing stolen personal property, viz., "beer and wine," of a value of less than $60, a misdemeanor, and at the trial the evidence shows such articles to be a case of beer and a bottle of champagne, no prejudicial error occurs to the defendant by the state's failure to introduce evidence of the actual value of such articles or in the return of a verdict finding the defendant guilty of "receiving stolen property and concealing stolen property," where such articles obviously possess some value and there is no express objection to the form of verdict submitted and returned. (Emphasis ours).

The record of the trial fails to demonstrate that appellant objected to the form of the verdicts submitted and returned by the jury.

While State v. Corkran would appear to control the resolution of this assignment, we find its reasoning somewhat dubious. Appellant contends the verdict as submitted to the jury was not erroneous, but the verdict as rendered subjected him to conviction of a fourth degree felony. Appellant cannot complain of an error prejudicial to him unless he timely objects. He did not view the verdict prejudicial to him, but favorable to him. Why should he call the error in the wording of the indictment to the prosecutor's attention, so that he might correct it?

Perhaps Corkran is to be understood as a warning that counsel as an officer of the court had a duty to bring to

the court the deficiency in the verdict forms. It was unquestioned that the victim in this case was nine or ten years of age at the time of the offense charged in the indictment.

In State v. Woods (1982), 8 Ohio App. 3d 56, the Cuyahoga County Court of Appeals addressed the issue of whether R.C. 2945.75 was complied with in verdict forms reading "as charged in the indictment." Appellant was indicted for receiving stolen property with an aggravating circumstance of the property being a gun in violation of R.C. 2913.71(C), and carrying a concealed weapon and the aggravating circumstance was that the weapon was a loaded gun in violation of R.C. 2923.21(A). The verdict forms did not specify the degree of the offense of any aggravating circumstances. The verdict forms referred to the offense "as charged in the indictment." The court affirmed

the conviction and stated the failure of the verdict forms to comply with R.C. 2945.75(A)(2) does not constitute reversible error, when the verdicts incorporate the language of the indictments, the evidence overwhelmingly shows the presence of the aggravating circumstances, and the defendants never objected at trial to the form of the verdicts. See, State v. Woods, supra, at 63.

The Woods court noted that the indictments were read to the jury and the language of the indictments was included in the charge to the jury.

The court sub judice informed the jury that the defendant had been indicted. (See Tr. 1125). The court informed the jury in his instruction that the defendant had been "charged" with seven counts of gross sexual imposition. He informed them before they could find the defendant guilty

of these charges they had to find beyond a reasonable doubt that defendant had sexual contact with another, not his spouse, who was less than thirteen years of age whether the defendant knew the age of such person. (Tr. 1130).

The seven verdict forms (11-17) read "We find Robert N. Berezoski _____ * of gross sexual imposition as charged in count (11-17) of the indictment. (* insert either guilty or not guilty).

We find the language of the indictments was read to the jury in the final instructions to the jury, the verdicts incorporated the language of the indictment, the evidence overwhelmingly showed the presence of the aggravating circumstances to wit, the victim's age, and the defendant never objected at trial to the form of the indictment. Accordingly, the

eighth assignment of error is overruled.

In a supplemental ninth assignment of error appellant contends the trial court erred by allowing the appellant's ex-wife to testify against him because that testimony was a privileged communication that is protected under R.C. 2317.02.

On January 17, 1985, defense counsel filed a motion to quash the indictment because appellant's ex-wife, Diane Berezoski, testified before the grand jury. Counsel also objected to any spousal testimony at trial in a motion in limine filed February 14, 1985. These objections were renewed at trial. (Tr. 20, 21).

The motion and objections were overruled, and appellant's ex-wife was permitted to testify about communications between her and appellant during coverture, and not made in the known presence of third persons.

Appellants refers us to the record at Tr. 157, 172, 173, 191, 192, 197, 198, 204-206, 211, 212, 216-221.

R. C. 2317.02 provides the following persons shall not testify in certain respects:

> (D) Husband or wife, concerning any communication made by one to the other, or an act done by either in the presence of the other, during coverture, unless the communication was made, or act done, in the known presence of hearing of a third person competent to be a witness; and such rule is the same if the marital relation has ceased to exist.

The State argues that R.C. 2317.02 sets forth the general principles as to spousal privilege, but Ohio has enacted other more specific laws dealing with spousal privilege namely, R.C. 2945.42. That statute provides in pertinent part:

> ...(H)usband or wife shall not testify concerning a communication made by one to the other, or act done by either in the presence of the other, during coverture, unless the communication was

made or act done in the known presence or hearing of a third person competent to be a witness, or in case of personal injury by either the husband or wife to the other, or bigamy, or failure to provide for, or neglect or cruelty of either to their children under eighteen years of age or their physically or mentally handicapped child under twenty-one years of age, or neglect or abandonment of such spouse under such sections. The presence or whereabouts of the husband or wife is not an act under this section. The rule is the same if the martial (sic) relation has ceased to exist. (Emphasis added).

The staff notes to Evid. R. 601(B) provides in pertinent part:

R.C. 2945.42 governed the competency of a spouse to testify in a criminal prosecution involving the other spouse and continues to govern the privilege accorded to a spouse. The concepts are to be distinguished. Rule 601 is directed to competency. Rule 501 is directed to privilege and is a general rule serving to maintain R.C. 2945.42 as to privilege. R.C. 601(B) modifies R.C. 2945.42 as to competency.

....

Rule 601(B) supersedes R.C. 2945.42 as to spousal competency, but not as to spousal privilege. (Emphasis added).

In State v. Rahman (1986), 23 Ohio St. 3d 146, the Ohio Supreme Court held that although a spouse may be competent to testify in a criminal trial, R.C. 2945.42 confers a substantive right upon the accused to exclude privileged spousal testimony concerning a confidential communication made or act done during coverture unless a third person was present or one of the other specifically enumerated exceptions contained in the statute is applicable.

In Rahman, the Supreme Court held it was error for the trial court to admit, over the objection of the defendant, the testimony of his wife concerning a statement made by the defendant to her, which was offered to show the motive for the killing of the wife's 20 year old son. The Supreme Court noted in reversing the

defendant's conviction for aggravated murder:

> Turning to this statute, we can find no exception permitting the testimony of appellant's wife. There was no third person present or within hearing during this conversation as there was in Mowery. The spouse was not the victim of this crime and was not present during its commission. The victim of this crime was not a child of the spouse under the age of eighteen, nor was the victim a physically or mentally handicapped child under the age of twenty-one at the time of this killing. Thus, the trial court erred in allowing appellant's wife to testify concerning privileged marital communications. (Emphasis added).

Clearly, the victim of the crimes charged in the indictment was a child of the spouse (Diane Berezoski) under the age of eighteen. Does the specifically enumerated exception contained in R.C. 2945.42 concerning acts or communication relating to "cruelty of either to their children under eighteen" apply where the indictment charges the defendant with

sexually abusing his spouse's natural daughter? Clearly we believe it does. Statutes providing the privileges must be strictly construed. Weis v. Weis (1947), 174 Ohio St. 416. Accordingly, the ninth assignment of error is also overruled.

Judgment of the trial court is Affirmed.

.....

KERNS, J., and WOLFF, J., concur.

Copies mailed to:

Ted E. Millspaugh
John H. Rion
Gerald A. Messerman
Hon. W. Erwin Kilpatrick

IN THE COURT OF APPEALS OF
MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee :

vs. :

ROBERT N. BEREZOSKI :

Defendant-Appellant :

CASE NO. 9568

FINAL ENTRY

.....

Pursuant to the opinion of this court rendered on the 17th day of December, 1986 the judgment of the trial court is Affirmed.

/s/ James A. Brogan
JAMES A. BROGAN,
Presiding Judge

/s/ Jospeh D. Kerns
JOSEPH D. KERNS,
Judge

/s/ William H. Wolff, Jr.
WILLIAM H. WOLFF, JR.,
Judge

Copies mailed to:

Ted E. Millspaugh
Assistant Prosecuting Attorney

John H. Rion, Attorney
Suite 1630 One First National Plaza
P.O. Box 1262
Dayton, Ohio 45402

Gerald A. Messerman, Attorney
1525 Ohio Savings Plaza
Cleveland, Ohio 44114

U.S. CONSTITUTION

AMENDEMENT V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless a presentment or indictment of a Grand Jury, except in case arising in the land or naval forces, or the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(Effective 1791)

AMENDMENT VI:

In all criminal prosecutions, the accused shall enjoy the right to a

speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compursory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

(Effective 1791)

AMENDMENT XIV:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive

any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the

proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any state to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States,

authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

(Effective 1868)

OHIO REVISED CODE

§2901.04 Rules of Construction.

(A) Sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.

(B) Rules of criminal procedure and sections of the Revised Code providing for criminal procedure shall be construed as to effect the fair, impartial, speedy, and sure administration of justice.

§2907.02 Rape.

(A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when either of the following apply:

(a) For the purpose of preventing resistence, the offender substantially impairs the other person's judgment or control by administering any drug or intoxicant to the other person, surreptitiously' or by 'force, threat of force, or deception.

(b) The other person is less than thirteen years of age, whether or not the offender knows the age of such person.

(2) No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.

(B) Whoever violates this section is guilty of rape, an aggravated felony of the first degree. If the offender under division (A)(1)(b) of this section purposely compels the victim to submit by force of threat of force, whoever violates division (A)(1)(b) of this section shall be imprisoned by life.

(C) A victim need not prove physical resistance to the officer in prosecutions under this section.

(D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweight its probative value.

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence

of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under section 2945.49 of the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that is inflammatory or prejudicial nature does not outweigh its probative value.

(E) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.

(F) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise unable to obtain services of counsel, the court may, upon request, appoint counsel to represent the victim without cost to the victim.

(G) It is not a defense to charge under division (A)(2) of this section that the offender and the victim were married or cohabiting at the time of the commission of the offense.

§2907.05 Gross sexual imposition.

(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons, to have sexual contact when any of the following apply:

(1) The offender purposely compels the other person, or one of the other persons, to submit by force or threat of force.

(2) For the purpose of preventing resistance, the offender substantially impairs the other person's, or one of the other persons', judgment or control by administering any drug or intoxicant to the other person, surreptitiously of by force, threat of force, or deception.

(3) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of such person.

(B) Whoever violates this section is guilty of gross sexual imposition. Violation of division (A)(1) or (2) of this section is a felony of the fourth degree. Violation of division (A)(3) of this section is a felony of the third degree.

(C) A victim need not prove physical resistance to the offender in prosecutions under this section.

(D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall

not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under section 2945.59 of the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(E) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.

(F) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise unable to obtain the services of counsel, the court may, upon request, appoint counsel to represent the victim without cost to the victim.

§2945.42 Competency of witnesses.

No person is disqualified as a witness in a criminal prosecution by reason of his interest in the prosecution as a party or otherwise, or by reason of his conviction of crime. Husband and wife are competent witnesses to testify in behalf of each other in all criminal prosecutions, and to testify against each other in all actions, prosecutions, and proceedings for personal injury of either by the other,

bigamy, or failure to provide for, neglect of, or cruelty to their children under eighteen years of age or their physically or mentally handicapped child under twenty-one years of age. A spouse may testify against his spouse in a prosecution under sections 2903.11 to 2903.13, 2919.21, 2919.22, or 2919.25 of the Revised Code for cruelty to, neglect of, or abandonment of such spouse, or in a prosecution under section 2907.02 or 2907.12 of the Revised Code for the commission of rape or felonious sexual penetration against such spouse in a case in which the offense can be committed against a spouse. Such interest, conviction, or relationship may be shown for the purpose of affecting the credibility of such witness. Husband or wife shall not testify concerning a communication made by one to the other, or act done by either in the presence of the other, during coverture,

unless the communication was made or act done in the known presence or hearing of a third person competent to be a witness, or in case of personal injury by either the husband or wife to the other, or rape or felonious sexual penetration in a case in which the offense can be committed against a spouse, or bigamy, or failure to provide for, or neglect or cruelty of either to their children under thirteen years of age or their physically handicapped child under twenty-one years of age, or neglect or abandonment of such spouse under such sections. The presence or whereabouts of husband or wife is not an act under this section. The rule is the same if the marital relation has ceased to exist.

RULE 403. Exlusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

(A) Exclusion mandatory. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

(B) Exclusion discretionary. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless preparation of cumulative evidence.

RULE 404. Character Evidence Not Admissible to Prove Conduct; Exceptions, Other Crimes

(A) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith

on a particular occasion, subject to the following exceptions:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same is admissible; however, in prosecutions for rape, gross sexual imposition, and prostitution, the exceptions provided by statutes enacted by the General Assembly are applicable.

(2) Character of victim. Evidence of a pertinent trait of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first agressor is admissible; however in prosecutions for rape, gross sexual imposition, and prostitution, the

exceptions provided by statute enacted by the General Assembly are applicable.

(3) Character of witness. Evidence of the character of a witness on the issue of credibility is admissible as provided in Rules 607, 608, and 609.

(B) Other crimes, wrongs or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

RULE 601. General Rule of Competency

Every person is competent to be a witness except:

(A) Those of unsound mind, and children under ten (10) years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly and;

(B) A spouse testifying against the other spouse charged with crimes except crimes against the testifying spouse or the children of either and;

(C) An officer, while on duty for the exclusive and main purpose of enforcing traffic laws, arresting or assisting in the arrest of a person charged with a traffic violation punishable as a misdemeanor where the officer at the time of the arrest was not using a properly marked motor vehicle as defined by statute or was not wearing a legally distinctive uniform as defined by statute.

(D) A person giving expert testimony on the issue of liability in any claim

asserted in any civil action against a physician, podiatrist, or hospital arising out of the diagnosis, care or treatment of any person, unless the person testifying is licensed to practice medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery by the state medical board or by the licensing authority of any state, and unless such person devotes three-fourths of his professional time to the active clinical practice in his field of licensure, or to its instruction in an accredited university.

(E) As otherwise provided in these rules.